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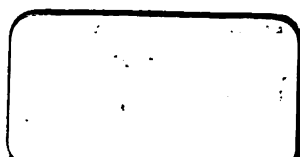


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R E P O R T S
OF
C A S E S

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum.* Hor.

V O L. III.

Containing the Cases of MICHAELMAS, HILARY, and EASTER Terms
In the 43th Year of GEO. III.
1802—1803.

L O N D O N:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1807.



J U D G E S
OF THE
COURT OF KING'S BENCH,
During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNEY-GENERAL.
The Honorable SPENCER PERCEVAL.

SOLICITOR-GENERAL.
Sir THOMAS MANNERS SUTTON.

A

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C A S E S

ARGUED AND DETERMINED

1802.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-third Year of the Reign of GEORGE III.

RICHARDS *against* HARRIS.

Tuesday,
Nov. 9th.

BURROUGH moved to set aside a verdict for irregularity in an action on the case on promises, on the ground of the plaintiff's not having given a term's notice of trial, as required by the practice of this Court, founded on the rule of Court of 1654 (a), where no proceedings have been had for a year before, which was the case here. He observed, however, that in last *Hilary* vacation (which was within the year), a notice had been given, that after *Easter* term then next the plaintiff would proceed in the cause; after which the common notice of trial was given: and he submitted that such previous notice within the year, upon which no proceeding was had, did not supersede the necessity of the term's notice. But,

It is not necessary to give a term's notice of trial after proceedings in the cause have been suspended for a year, if within the year the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient.

The Court, after consulting the Master, said that the practice was settled otherwise: and therefore the notice of trial being sufficient,

Rule refused (b).

(a) This is a rule of Court of C. B. applicable to cases where no proceedings have been had for four preceding terms, exclusive of the term in which the last proceeding was had. But the same practice was adopted in this Court in 5 and 6 Geo. 2. (*vide* note to *Haley v. Riley*, *Dougl.* 71.) in cases where no notice of proceeding has been given within a year. *Per* Master *Benton*. *Vide* 1 *Crompt. Prac.* 212.

(b) So a notice of trial, though countermanded, prevents the necessity of a term's notice, 2 *Tidd's Prac.* 682. cites 2 *Salk.* 457. 650.

1802.

Tuesday,
Nov. 9th.

Where the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in *scire facias*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a *devastavit*; held that the executors being fixed conclusively with assets by such latter judgment, the issue upon *non detinet* lay upon them to prove the due administration of such assets; otherwise the plaintiff was entitled to recover. A declaration against an executor suggesting a *devastavit* brought in the *detinet* only is at any rate cured by verdict. But

semble that independent of the verdict the plaintiff on such a declaration may take judgment *de bonis testatoris*.

HOPE against BAGUE and THOMPSON.

THE plaintiff declared in debt in the *detinet* only against the defendants as executrix and executor of *G. Bague*; for that whereas the plaintiff in the lifetime of the testator, by the judgment of *B. R.*, recovered against him a certain debt of 4,200*l.* and costs, and after the testator's death the plaintiff had judgment of execution on *scire facias* against the defendants, executrix and executor as aforesaid, for the debt and damages aforesaid, to be levied *de bonis testatoris*, in the hands of the defendants to be administered; which judgment and award of execution remain in full force and unsatisfied. And that after the said judgment against the testator, and before the exhibiting the plaintiff's bill, assets came to the defendants' hands to the value of the debt and costs: and then suggests a *devastavit*; whereby an action has accrued to the plaintiff to demand of the defendants 4,200*l.* and costs: but to pay the same, the testator, in his lifetime, and the defendants, as executors, since his death, have refused, &c. To this the defendant, *Sarah Bague*, pleaded, 1. Not *detinet*, 2. Plene administravit; and the defendant *Thompson* pleaded only plene administravit.

At the sittings before last *Trinity* term, before Lord *Ellenborough*, the plaintiff proved the original judgment recovered against the testator, and the judgment in *scire facias* against the defendants (admitted to be founded on the return of two *nihilis*;) and it also appeared that the defendants had paid a simple contract creditor of the testator's to the amount of 1500*l.* And the principal questions were, Whether it were necessary in this form of declaring in the *detinet* only to prove an actual *devastavit* or wasting of the assets, as alleged in the declaration? And if so, Whether the evidence given were sufficient to prove that fact? For though the judgment in *scire facias* against the executors was admitted to be conclusive evidence of assets, yet it was denied on the part of the defendants to be any evidence of a *devastavit*, which they contended was put in issue upon the plea of *non detinet*: and as to the payment of the simple contract creditor, that was no *devastavit*, provided there were assets *ultra* to cover this higher demand, which were admitted by the judgment in *scire facias*. In answer

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 —
 HOPE
 against
 BAGG.

to this it was urged that the plea of *plene administravit*, however irrelevant in itself, was at least evidence of an admission by the defendants that they had not assets sufficient *ultra* what had been so paid. A verdict having passed for the plaintiff,

Manley, in the last term, moved to set it aside, on the ground that the action being in the *detinet* only, and not in the *debet* and *detinet*, as it ought to have been, was founded solely in the *tort*; and that the plea put in issue the whole declaration, of which the *devastavit* was the gist, which it lay upon the plaintiff to prove and which he had failed in doing for the reasons before urged. That except the case of *Skelton v. Hawling* (a), there was no instance in the books of a *devastavit* sustained without proof either of a previous *scire fieri* inquiry, or of a return of *nulla bona* to a to a *fieri facias*; and he referred to *Williams v. Roberts* (b), *Erving v. Peters* (c), and *Tidd's Practice* (d).

Erskine and *Warren* resisted the rule on the ground that the pleas of *plene administravit* by each of the defendants were wholly out of the question, as they were concluded to admit assets by the judgment in *scire facias* against them; and then it lay upon them to account for the due administration of the assets, the suggestion of the *devastavit* being a mere matter of form: and they relied on the case cited of *Skelton v. Hawling*. But they insisted that if any other evidence were wanting of a *devastavit* beyond the judgment in *scire facias*, and the mere act of detaining the debt after such acknowledgment of assets, it was supplied by the proof of the payment to a simple contract creditor, in prejudice to the judgment creditor. That though it were more usual to declare against executors in the *debet* as well as *detinet*, yet it was not necessary so to do, because the debt was fixed by the judgment against the testator, to which by the *scire facias* the executors were made parties; and therefore the gist of the action, even in the usual form of declaring, was the *detinet*.

The Court then discharged the rule; considering the judgment in *scire facias* as conclusive against the defendants, that they had assets, and that they were estopped from saying the contrary; and therefore that the pleas of *plene administravit*, pleaded severally by the defendants, might have been demurred to. Then being fixed with assets, the issue on the plea of *non detinet* lay on the execu-

(a) 1 *Wilf.* 258.

(b) *Noy*, 7.

(c) 3 *Term. Rep.* 695.

(d) 2 vol. 1039, 47.

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HOPE
against
BAGUE.

tors, to prove that they had properly administered the effects of their testator, of which they had given no evidence, and were therefore proved to have *detained* the debt in the terms of the issue. And *Lawrence J.* referred to the note by *Serjt. Williams* at the end of the case of *Whetley v. Lane* (a), where all the cases were collected with great learning and ability; amongst others that of *Skelton v. Hawling*, which was laid in the *detinet* only, as appeared by the explanation there given of the report in *Willson*, which was shewn to be inaccurate.

Manley thereupon moved in arrest of judgment, on the ground of the incongruity which would appear upon the record. For on this declaration in the *detinet* only, it must be taken to be a debt of the testator's, on which there can only be judgment *de bonis testatoris* for the debt, and *de bonis testatoris et si non*, &c. for the damages for the delay; even though the executors have pleaded a false plea, as plene administravit, which is found against them, 5 *Com. Dig. Plader.* 2 D. 16. Whereas it appears upon the face of the declaration that the defendants were concluded by the judgment in *scire facias*, and therefore that it is become their own debt, for which there ought to be judgment *de bonis propriis*. And in *Salter v. Codbold* (b), it was adjudged on demurrer that an administrator could not be sued in the *detinet* for money due in the intestate's lifetime, and also in the *debet* and *detinet*, for other money due in his own time, which were joined in the same action.

Erskine, Wood, and *Warren*, now shewed cause, and said that it was unnecessary to consider whether the declaration ought properly to have been laid in the *debet*, as well as *detinet*, since at most it was only a defect in form, which was cured by verdict, according to the cases of *Coomber v. Watton* (c), *Frevin v. Paynton* (d), *Burland v. Tyler* (e), and *Lee v. Pilmy* (f).

Gibbs and *Manley* contra admitted that the defect was cured by the statute of *jeofails*.

Lord ELLENBOROUGH Ch. J. There can be no doubt of it. But even independent of the statute, if the plaintiff may charge an executor in the *debet* and *detinet* in this case so as to entitle himself to judgment *de bonis propriis*, surely he may wave part

(a) 1 *Saund.* 216. 119. 219. d.(c) 1 *Sid.* 342.(e) 2 *Ld. Ray.* 1391.(b) 3 *Lev.* 74.(d) 1 *Lev.* 250.(f) *Ib.* 1513.

of his right, and charge him in the detinet only, so as to entitle himself to the lesser judgment de bonis testatoris.

LAWRENCE J., in corroboration of the opinion intimated by the Lord Chief Justice, referred to *Rayson v. Cordyre* (a), where debt in the detinet was brought against an executor for rent accrued in his own time; and after verdict quod detinet, *Hales* moved in arrest of judgment that the action ought to have been in the debet and detinet. But the Court gave judgment for the plaintiff; for the sole inconvenience was to the plaintiff himself, who waived his advantage to demand satisfaction out of the estate of the defendant himself, and contented himself with what the testator's estate would afford. And he added, that if the plaintiff could take such a judgment in this case, it was not to be arrested; and that was for him to determine.

Per Curiam.

Rule discharged.

1802.

HOPE
against
BAGUE.

The KING against The Governors and Directors of the Poor of *Wednesday,*
ST. MARY MAGDALEN BERMONDSEY, in the County of *Nov. 10th.*
SURRY.

AN order of Sessions was returned into this Court by certiorari, reciting that at the General Quarter Sessions for the county of *Surry*, &c. an appeal was made by *J. Rolls*, Esq. against a rate or assessment made for the relief of the poor of the parish of *St. Mary Magdalen Bermondsey*, in the said county, on the ground of being over-rated; which rate was entitled, "A rate or assessment made 3d of *June* 1801 by the *Governors and Directors of the poor of the parish of St. Mary Magdalen Bermondsey*, in the county of *Surry*, for the relief of the poor of the said parish, upon all and every inhabitant, &c. pursuant to the act of Parliament made for amending and enlarging the powers and rendering more effectual the act of Parliament made for ascertaining and collecting the poor's rates, and for better regulating the poor in

Persons appointed by an act of parliament governors and directors of the poor of a certain parish, and made liable upon appeal against a rate made by them to the payment of costs in case the Sessions should award any to the

appellant, cannot be witnesses on such appeal; though in truth only *trustees*, and entitled to be reimbursed such costs out of the parochial fund; for they are parties to the cause and liable to the costs in the first instance.

(a) *All* 42.

B 3

the

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The King
against
The Govern-
ors, &c. of
the Poor of
ST. MARY
MAGDALEN
BERMOND-
SEY.

the said parish, and for other the purposes therein mentioned, at the rate of 6s. in the pound, &c.;" which rate was allowed and confirmed by the Justices in Sessions. Thereupon, upon due proof that the notices required by the said acts had been given by the appellant, and that he had entered into recognizance to try the appeal, and to abide the judgment of the Court, and to pay such costs as might be awarded: and upon hearing counsel on both sides, examination of witnesses upon oath, and the premises fully considered; it was ordered by the Sessions that the appeal should be allowed, and the rate on the appellant reduced, &c.: and that the said Governors and Directors should forthwith pay to the appellant 30l. costs: subject to the opinion of this Court on the following question; "Whether the Governors, and Directors, &c. appointed by the several acts in that behalf passed, were legal witnesses for the respondents on the hearing of the said appeal; *Thomas Carter*, one of the Governors and an inhabitant, being tendered on behalf of the respondents, and rejected by the Court?"

The stat. 31 *Geo. 2. c. 45. f. 1, 2.* enacts, that the churchwardens, overseers of the poor, and vestrymen of the parish of *St. Mary Magdalen Bermondsey*, or any nine or more of them, shall meet in the vestry-room in *Whitsun* week, or oftner, from time to time, as occasion shall require, and ascertain the amount of the rate for the relief of the poor, and within eight days afterwards to make an assessment accordingly. By *f. 8.* the same body at a public meeting, shall, if they think fit, annually or oftner, appoint a treasurer (removeable at their pleasure) for the receipt of the monies to be collected by the said rates, and all other monies applicable to the relief of the poor of the parish, who shall account for the sums so received, and pay over the balance to the persons appointed by the body to receive the same, to be applied to the purposes of the act. And by *f. 16.* such rates are to be collected either by the churchwardens and overseers or certain collectors chosen by the body, in the manner therein mentioned. By *f. 19.* if any person shall find himself aggrieved by the rate, he shall first apply for relief to the vestry of the parish, and if not relieved shall be obliged to pay the rate, and then upon appeal to the next General Quarter Sessions holden, &c. if it appear to the Justices that he has overpaid, they may order the money to be refunded. By *f. 9.* amended by *f. 31 Geo. 3. c. 19. f. 1.* upwards of 50 of the principal inhabitants of the parish by name,

name, together with the resident Justices of the Peace, Rector, Churchwardens, and other parochial officers for the time being "shall be called Governors and Directors of the poor of the said parish;" to whom all the powers given by the first act to the vestry are transferred, (except that of electing the Governors and Directors). And a method is pointed out of making such election, in case of a vacancy by the death or removal from the parish of any of the persons named: which Governors and Directors are disqualified under a penalty from having any interest in any contracts to be made by them for the relief of the poor. But by the first act they are enabled to make by-laws concerning the disposition of the money raised and for the regulation of the poor; and any five or more of them may direct the payment of monies by the treasurer. And by *f. 21.* of the first act, all laws relating to the poor, not thereby altered, are to remain in force. By *f. 6.* of the last act, the Governors and Directors are at all meetings to pay their own expences. And by several subsequent clauses, in all cases where Justices of the Peace are empowered to proceed on the complaint of the churchwardens and overseers of the poor, they may proceed in like manner on the complaint of the Governors and Directors. And it is enacted "that any inhabitant of the said parish, although rated and paying rates for the relief of the poor, *may upon any trial, hearing, examination, or otherwise, touching or concerning the execution of this or the former act, be deemed a competent witness.*" Also the said Governors and Directors shall *sue and be sued* for all matters, &c. *in the name of their treasurer for the time being*, and he shall be *indemnified out of the monies arising under the said acts.* Also any person appealing to the Quarter Sessions, shall, besides giving a certain notice in writing to the treasurer or clerk to the said Governors and Directors, enter into a *recognizance to the said Governors and Directors*, before some Magistrate, *conditioned to try his appeal, and abide the order of, and pay such costs as shall be awarded by the Justices at such Quarter Sessions;* and the Sessions on due proof of such notice, &c. shall hear and finally determine the matter of such appeal in a summary way, "*and award such costs to the party appealing or appealed against, as the said Justices shall think proper.*"

Lawes in support of the order of Sessions maintained that the witness tendered by the respondents, who was in truth one of the parties to the suit, was properly rejected as a witness. 1st, By the general rules of law no party to a cause can be also a witness, it

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being contrary to the first principles of justice independent of any pecuniary interest. 2dly, No person interested in the event can be a witness; and here the person tendered had a direct interest, as the stat. 31 Geo. 3. enables the Sessions to award costs against either of the parties to the appeal; and in fact costs were awarded against the respondents, (of whom the witness was one) in this very case. It cannot vary the consideration of the question that he stood in the character of a bare trustee; for though in some cases persons standing in that character have been admitted as witnesses, though legally interested in the event; yet never where the same person was a party on the record, and also liable in the first instance to the payment of the costs. Therefore an executor who was lessor of the plaintiff in an ejectment, though he had no beneficial interest, could not be received as a witness; nor in like manner a prochein amy suing for an infant; nor even a mere stranger who has undertaken to the attorney in the cause to be answerable for his costs. Then, 3dly, the clause enabling inhabitants rated to be witnesses does not reach this case. He was then interrupted by

Lord ELLENBOROUGH C. J., who observed, that it lay on the other side to produce some authority to shew, that one who was party to the suit and liable to costs, though a trustee, had ever been admitted as a witness in the cause.

Nolan and *Waterrell* contra, admitted that they had not met with any case exactly like the present; but the nearest was *Rees v. Woodland* (a), where on the first hearing of the case the Court were of opinion that a person who was rated and paid for land which he rented in the parish was a good witness for the parish, his landlady being under covenant to reimburse him again such payment. An executor who takes no beneficial interest under the will is a competent witness to prove the testator's sanity (b);

(a) 1 Term Rep. 261. The first case came on to be argued in *Mich.* 26 Geo. 3. The counsel were going upon the argument of fraud, but were soon interrupted by Lord Mansfield C. J. who said—The great point here is as to the justices not having received the testimony of *Noribots*. It was objected to his competency that he was assessed to the parish rates; but the answer is, that it appears there was an agreement between the landlord and tenant that the former should indemnify the latter from the assessment; and the tenant had a right to deduct it out of his rent; therefore the Sessions ought to have heard him. MS.

(b) *Goodtitle v. Welford*, Dougl. 139. and *Low v. Jolliffe*, 1 Black. Rep. 365.

and

and so to prove a codicil setting up again the first will after a second made (a); and yet he would be liable in the latter case to refund what he had paid away if the will were set aside. So in *Weller v. The Governors of the Foundling Hospital* (b), where the action was brought for digging a well and erecting a pump for the hospital, several of the governors were examined as witnesses for the defendants, though it was objected that they were parties on the record: but Lord *Kenyon* C. J. answered, that they were sued in their corporate and not in their natural and individual capacities. So here the respondents were not answerable for the costs in their individual capacities; but were entitled by the necessary construction of the act of parliament, though there were no express provision for that purpose to direct the payment to be made in the first instance out of the parochial fund placed under their control. But further they urged the incongruity which would arise in the construction of the act, if by the express enactment of the Legislature an inhabitant were made a competent witness who had a direct and beneficial interest in the event of the suit; and yet a governor, who as such had no beneficial interest and a mere nominal liability, should be deemed incompetent. From whence they argued, that by the exclusion of the greater was necessarily intended the exclusion of all minor interests, especially in the same persons.

Lord *ELLENBOROUGH*, C. J. Ultimately the governors may not be liable to pay the costs out of their own pockets; but in the first instance and quoad the appellant, they are the persons against whom the Legislature have directed the Sessions to award costs. The words of the act are, that the Sessions shall hear and determine the matter of the appeal, "and award such costs to "the party appealing or appealed against as the justices shall "think proper." Now who were the parties appealed against but the governors themselves? They are the persons to whom the act directs that the recognizance shall be entered into by the appellant to pay costs in case they shall be awarded against him. They then are the persons liable in the first instance, although they may afterwards be reimbursed out of the parochial fund. There are many cases to be found like that which has been mentioned under Mr. Jolliffe's will, where persons clothed with

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(a) *Bailey v. Wilson*, cited 4 Burr. 2254.
(b) *Peake's Ni. Pri. Cases*, 153.

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naked trusts have been admitted as witnesses; but no such case can be quoted where the person was both party to the suit and liable individually to costs. The case of *Weller v. The Governors of the Foundling Hospital* was that of a corporation sued, and therefore the corporation were only liable in their aggregate, and not in their individual capacity. But nothing appears in these acts of parliament to shew that the Legislature meant to make these governors a corporation: they have no common seal, nor any other criterion of incorporation. With respect to the case of *Rex v. Woodland*, where the witness was indemnified by another person, it is enough to say that no such circumstance is found here; non constat that the governors ever will be indemnified. Not that I am prepared to say that an interested person being indemnified by another will therefore make him a witness: but here the witnesses were not so indemnified. Then these persons not being liable in a corporate capacity, but individually in the first instance for the costs, and being themselves also parties to the suit, there is no case which goes the length of establishing their competency as witnesses. The act has indeed said that inhabitants rated shall not on that account be disqualified from giving testimony; but there it has stopped; and an argument arises from its silence, that if it had meant to go further and to include the governors also, it would have said so in terms: but that not being the case, we cannot include them in that provision.

GROSE and LAWRENCE Justices delivered their opinions shortly to the same effect on the construction of the act. And

LE BLANC J. added, that there was no incongruity in the Legislature having expressly made the rated inhabitants witnesses, and having omitted to extend the same provision to the governors and directors; because it had given these latter an additional interest in the event of the appeal, by making them liable in the first instance to the costs.

Order of Sessions confirmed.

DOR,

1802.

DOE, on the Demise of MORRIS and Others, *against* ROSSER.*Wednesday,
Nov. 10th.*

IN ejectment for certain messuages and lands in the parish of *Swansea*, in the county of *Glamorgan*, it appeared in evidence on the part of the plaintiff at the trial before *Lawrence J.* at the last assizes, that in the year 1799, a prior ejectment having been brought on the demise of the same lessors against this defendant, for part of the same premises, which were leasehold, it was agreed to refer the matter to arbitration, and accordingly bonds of arbitration were entered into, in consequence of which the premises were afterwards awarded to be delivered up to *Mr. Morris*: but the defendant not being satisfied with the award, applied to this Court to set it aside, but without effect; notwithstanding which he still retained the possession of the premises; upon which this ejectment was brought. The defendant offered at the trial to go into evidence of his title; but the learned Judge rejected it; considering him as precluded from disputing the lessors' title in this action by the award, to which the present parties had bound themselves to submit; upon which the plaintiff recovered a verdict.

Abbott now moved for a new trial, on the ground that the award, though *prima facie* evidence, was not conclusive between the parties; the subject matter affecting the freehold and inheritance of land, which could not be determined by arbitration, according to 1 *Roll. Abr.* 242. l. 10. & 1 *Com. Dig.* tit. *Arbitrament* D. 3. But if the award were admitted to be conclusive evidence of the title, it would indirectly determine the freehold and inheritance; and though but the judgment of a private person, it would have an higher effect than a judgment in ejectment, which is the act of the Court, and is allowed not to be conclusive.

Per Curiam. The award cannot have the operation of conveying the land: but there is no reason why the defendant may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented that the award of the arbitrator chosen by themselves should be conclusive as to the right to the land in controversy between them; and this is sufficient to bind them in the action of ejectment.

Rule refused.

HICKS

1802.

Wednesday,
Nov. 10th.

Hicks against Hicks.

Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received to recover back the consideration-money paid for it, the grantor may set off the payments made in respect of such annuity though for more than six years, unless the plaintiff reply the statute of limitations.

THIS was an action for money had and received to recover back 711*l.* the consideration money paid many years ago for an annuity granted by the defendant to the plaintiff; but which annuity after having been paid for several years (more than six) had been recently set aside by the Court on the application of the defendant for a defect in the memorial of registry. The defendant pleaded a set-off of more money paid to the plaintiff's use than was due to him: and this appeared at the trial to be true, provided the defendant was at liberty to set off all the payments which had been made to the plaintiff in respect of the annuity for more than six years past; which Lord *Ellenborough* held that he might, the plaintiff not having replied the statute of limitations: upon which a verdict passed for the defendant at the last sittings before his Lordship.

Erskine now moved to set aside the verdict, and have a new trial, on the ground that a party, who had set aside an annuity on account of illegality, and had refused to execute a new security for the consideration he had received (a fact which he stated to have appeared at the trial) had no right to consider those which then appeared to have been his own voluntary payments to the grantee, as so much money paid to his use, for which he had promised to pay; and therefore he contended that the defendant had no right to set off any such payments against the plaintiff's demand for the original consideration, which had failed. And he cited *Beauchamp* and *Borret* (a). But by

Lord ELLENBOROUGH Ch. J. This was either an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by the one party to the other's use. If the consideration of the annuity be money had and received, it must be money had and received with all its consequences; and therefore the defendant must be at liberty to set off his payments as such, on the same score. In the case cited, Lord *Kenyon*'s opinion might have proceeded on the particular circumstances of it; and that seems probable from the stress which he laid on the justice of the case. And if he meant to go beyond

(a) *Peake's Ni. Pri. Cas.* 109.

that

that and lay down the doctrine stated generally, I should not be inclined to accede to the authority of the opinion.

Per Curiam,

Rule refused.

KENT *against* ELSTON and Others.

1802.

Thursday,
Nov. 11th.

IN an action on the case for negligently running down the plaintiff's ship at sea by another ship belonging to the defendants, it was ordered by a rule of Nisi Prius, by consent of the parties, that all matters in difference between them should be referred to the award of a certain arbitrator, at whose discretion the costs of the cause and the reference was also to be: who thereupon awarded, that all proceedings in the cause should cease, and each of the parties pay their own costs; and that the defendants should pay to the plaintiff 795*l.*; and that the expences of the reference should be borne equally between them, and mutual releases given on payment of the sum awarded to the plaintiff. The arbitrator delivered, together with his award, a certain paper containing observations on the evidence laid before him, and his reasons for making the award: the result of which was, after referring to various passages transcribed from the complete body of sea laws, ancient and modern (*p.* 186. *art.* 50. *p.* 189. *art.* 67. & *p.* 190. *art.* 70.) from whence it appears that if an accident happen by the striking of two ships, without any or equal blame on either side, the loss shall be proportionably divided between them; that the arbitrator concluded "that both parties were " really and equally blameable, and that the consequence naturally followed that the loss ought to be divided. He then proceeded to cast up the several items of loss incurred by the respective ships of the plaintiff and the defendants, the latter of which was very trivial compared to the former; and he divided the whole loss, which left a balance for the defendants to pay to the plaintiff of 792*l.* as mentioned in the award, to which reference was made.

If an arbitrator professes to decide upon the law, and he mistake it, the Court will set aside the award; although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the Court.

A rule was obtained in the last term for setting aside the award, on the ground of a mistake in the arbitrator in point of law, in awarding any damage to the plaintiff, when it appeared by his own shewing that either no negligence was imputable to the defendants, which was the gist of the action, or that at least the accident

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accident happened as much from the fault of the one as the other.

Park and Halroyd, who now shewed cause, did not deny that the grounds stated by the arbitrator for making his award (provided they were to be taken as part of the award), could not be sustained in point of law; for that the onus probandi lay on the plaintiff in the action, to shew that the loss happened from the negligence of the defendants' ship's crew: but they referred to the case of *Ching v. Ching (a)*, to shew that an award was not impeachable on the ground that the arbitrator had not decided according to the strict rule of law. And they observed that it might be sometimes equitable and even advantageous to both parties to depart from the strict rule; and on that ground the case referred to might be sustained. Though they admitted that if it appeared that the arbitrator meant to decide according to law, and was mistaken in his notion of the law, this Court had been in the practice of setting aside awards so made. But they contended that the result of the arbitrator's opinion in this case was not that the defendants' ship was blameless; which would have shewn that they were not liable for any damage, but that both parties were blameable, which would sustain mutual claims upon each other.

Raine contrâ, after commenting on the evidence, as proving that the damage had not happened from the negligence or misconduct of the defendants' ship, which could alone warrant the award of damages to the plaintiff; but that it rather happened from accident or mutual mistake; contended that the arbitrator's opinion was evidently founded upon a mistake of the law, in supposing that a loss arising from mistake or mutual inattention was to be divided between the parties. And he contended against the authority of the case quoted, to the extent of the doctrine there laid down, as contrary to the repeated decisions of this Court upon the subject of awards, which were continually set aside on the ground of mistake of the law by the arbitrator. And here he observed the arbitrator had delivered the paper in question to the parties as containing his reasons for making the award.

GROSE J. (b) The award is clearly wrong, considering it to

(a) 6 Ves. Jun. 282.

(b) Lord Ellenborough C. J. was absent on a special commission at the Old Bailey.

be founded upon the reasons stated by the arbitrator in the paper delivered with it (which altogether must be taken as one instrument); for it appears from thence that he proceeded upon a ground which cannot be supported in our law, And he has done wrong, according to his own principles and view of the subject; for it is evident that he meant to determine according to law, and he has mistaken it; therefore the award is not such as he intended it to be.

LAWRENCE J. It is not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the Court to examine them. Here there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed. Besides which he seems to have considered that there were cross actions between these parties referred to him, (which was not the case), and to have decided accordingly; and on that ground also the award would be bad. With respect to the case cited, it appears but a short note; and without knowing more of the circumstances of it than are there stated, I cannot form any judgment upon the opinion said to have been delivered, whether it apply to this case or not.

LE BLANC J. The paper in question was delivered, together with the award, by the arbitrator, as containing his reasons for coming to the conclusion, which he did; we must therefore take them to be such, as much as if they were inserted in the award itself: and this could only have been done for the purpose of enabling any party who was dissatisfied with the award, to take the opinion of the Court upon the validity of those reasons. We then are of opinion that the reasons assigned are bad, and therefore that the award cannot be supported.

Rule absolute.

1802.

KENT
against
ELSTON.

1802.

Friday,
Nov. 12th.SMITHEY *against* EDMONSON.

In an action by the assignee of a bond given to the Lord Chancellor by the petitioning creditor of a bankrupt under the stat. 5 G. 2. c. 30. s. 23. [and which was assigned by the Lord Chancellor to a creditor of the bankrupt, on the ground of the commission having been sued out fraudulently;] wherein the defendant by his plea set forth the Lord Chancellor's order

for the assignment, whereby it appeared that he had previously ordered a *certain sum* received by the defendant of the bankrupt to be refunded, and *further ordered* the bond to be assigned to the plaintiff, and the costs of the petition to be paid by the defendant; and then the plea averred *payment* before the suing out of the plaintiff's writ of the particular sum mentioned and the costs, *in satisfaction* of the damages sustained by the bankrupt's estate; and that neither the plaintiff nor the bankrupt's estate had sustained any other damage *ultra* the sums so paid to the plaintiff: held such plea to be no answer to the action; for by such order of the Lord Chancellor must be understood, that the whole penalty of the bond was assigned to the plaintiff as creditor and assignee of the estate under a second commission, (and therefore a party grieved by the first fraudulent commission) by way of satisfaction in damages for the injury sustained. But it was also considered to be competent to the Lord Chancellor to review his former order, even after judgment for the plaintiff for the whole penalty, and to direct the whole or any part of such penalty to be applied accordingly. It seems that such a bond is not within the stat. 8 & 9 W. 3. c. 11. s. 8. by which a jury is to assess damages; because by the stat. 5 G. 2. the damages are to be ascertained by the Lord Chancellor; although he may assist his conscience by directing an inquiry before a Master or an issue at law.

THE plaintiff, as assignee of the Lord Chancellor, brought an action of debt on bond against the defendant to recover the penalty of 200*l.*: and the declaration stated, that whereas the defendant, on the 25th of *February* 1794, had caused a petition to be presented to the Lord Chancellor, praying that a commission of bankrupt might be issued against *W. Webb*, of &c. dealer and chapman; and thereupon the defendant, by his certain writing obligatory made and given according to the statute (a), under his seal, acknowledged himself to be bound unto the said Lord Chancellor in 200*l.* to be paid to him or his assigns, &c. when requested; with a condition that if the defendant should prove as well before the major part of the Commissioners to be appointed in a commission of bankrupt against the said *Webb*, as upon a trial at law, in case the issuing forth of the said commission should be contested and tried, that the said *Webb* was justly and truly indebted to the defendant in 100*l.* or upwards, and was become bankrupt within the true intent and meaning of the statutes, &c.; and if the defendant should cause the said commission to be executed according to the directions of the statute (5 *Geo.* 2. c. 30.), then the said writing obligatory to be void. The plaintiff then averred, that afterwards, on the 6th of *March* 1794, a commission of bankruptcy issued against *Webb*, but that the defendant did not prove, &c. (negating the performance of every part of

(a) *Vide post.* 27.

the condition), by means whereof the said writing obligatory became forfeited to the Lord Chancellor. And that no part of the money therein specified being paid, the Lord Chancellor afterwards, on the 17th of *July* 1800, upon the petition of the plaintiff (being a creditor of *Webb*, and one of the assignees of the estate and effects of the said *Webb*, a bankrupt, and the person in that behalf grieved), by an indorsement on the said writing obligatory, made under his hand and seal, assigned the same to the plaintiff, according to the form of the statute, &c.: by means whereof and by force of the statute, &c. an action had accrued to the plaintiff, as assignee of the Lord Chancellor, to demand, &c.

The defendant by his plea craved oyer of the writing obligatory and condition, and of the assignment, which latter was in substance as follows: whereas by my order dated 14th of *June* 1800, made upon the petition of *W. Smithey* (the plaintiff) one of the assignees of the estate of *W. Webb*, a bankrupt, I ordered that the commission issued against *Webb* should be superseded, and the bond in question should be assigned to the plaintiff in order that the same might be put in suit against the defendant, for the purpose of recovering from him the damages and costs sustained by the estate of *Webb*, in consequence of the said commission having been sued out, and the said plaintiff's application to supersede the same, I

A. Lord L. Lord High Chancellor, &c. do therefore assign, &c. unto the plaintiff, as assignee as aforesaid, his executors, &c. the bond in question, and all benefit and advantage thereof, and all monies thereby secured and now due, or which may hereafter become due and payable by virtue thereof. (Signed and sealed by the Lord Chancellor, and dated 17th *July* 1800). And then the defendant pleaded *actio non*, &c. because admitting that such commission of bankruptcy issued against *Webb*, yet that by the said order of the Lord Chancellor in the said assignment mentioned (which said order was made upon hearing the petition of the plaintiff), after reciting, that whereas the plaintiff, one of the assignees of *Webb*, the bankrupt, and also a creditor of his, did, on the 15th of *May* last, petition the Lord Chancellor, shewing that on the 6th of *March* 1794. the defendant sued out a commission of bankruptcy against *Webb*, wherein he was petitioning creditor, and which never had been prosecuted (being the commission in the condition of the bond mentioned); that instead of prosecuting the same, the defendant had made use thereof, and did thereby obtain from *Webb*, after issuing such commission, 19*l.* 13*s.* 4*d.*

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which he had stated as his costs and expences of suing out such commission. That in *August* 1796 another commission was issued against *Webb*, wherein the petitioner (the plaintiff) was chosen assignee, on an act of bankruptcy committed prior to the said 6th of *March* 1794, the said petitioner (the plaintiff) was advised to have the first commission superseded; the Lord Chancellor ordered *that the said 19l. 13s. 4d.* being the cost paid by *Webb* to the defendant, for suing out such commission, *should be paid by the defendant to the said petitioner* (the plaintiff), and also *that the defendant should pay to the plaintiff, all and every the costs of and occasioned by the several matters aforesaid, with the costs of that application to him, the said Lord Chancellor*, such costs to be taxed, &c. The defendant then further pleaded, that after the making of the said order, and of the said assignment, &c. and *before the suing forth of the plaintiff's writ*, viz. on 24th of *July* 1800, *all and every the said costs by the said order directed to be taxed, were duly taxed, at the sum of 22l. 6l. 10d., and that, the defendant then and there paid the same to the plaintiff, together with the aforesaid 19l. 13s. 4d., in the said order mentioned and directed to be paid, &c. for the costs of suing out the (first) commission, &c. according to the tenor and effect of the said order, in satisfaction for the damages and costs sustained by the estate of Webb, in consequence of the said last mentioned commission having been sued out, and the plaintiff's application aforesaid to supersede the same: which said several sums of 22l. 6s. 10d. and 19l. 13s. 4d. the plaintiff accordingly accepted and received from the defendant. And then the defendant averred that the plaintiff had not, nor had the estate of Webb, sustained any damages or costs whatsoever, in consequence of the last-mentioned commission having been sued out, or the plaintiff's application to supersede the same, other than the two several sums before-mentioned, and which had been so paid and received, &c.*

The replication set forth the order of the Lord Chancellor, reciting the plaintiff's petition more at length than it was stated in the plea; whereby it appeared to have been stated to the Lord Chancellor that the defendant, instead of prosecuting the commission he had sued out against *Webb*, had made use of the same, and had obtained from *Webb*, after the issuing of the said commission, divers sums of money, whereby he had *privately received more in the pound than the other creditors*, viz. 50l., 30l., and 10l., as well

well as 19l. 13s. 4d. (before-mentioned), making altogether 109l. 13s. 4d. That in *August* 1796 another commission issued against *Webb*, wherein the plaintiff was chosen assignee, on an act of bankruptcy committed prior to the 6th of *March* 1794; and that in *December* 1796 the defendant petitioned that the last-mentioned commission might be superseded with costs, stating that there was no petitioning creditor's debt; in consequence of which an issue was directed to try that question, &c. which was found against the defendant, and his original petition ordered to be dismissed with costs, &c.: and stating further, that the petitioner was advised that it was necessary and material that the first commission should be superseded, and the money received by the defendant of the bankrupt, refunded for the benefit of the creditors, and that the bond given on that occasion ought to be assigned the same being forfeited; and therefore praying that the commission of bankrupt issued by the defendant might be superseded, and all the proceedings under it deposited with the secretary of bankrupts; that the bond given to the Lord Chancellor, should be assigned either to the plaintiff, *W. D.* (the other assignee), &c. or to the bankrupt; and that the defendant should be examined before the commissioners under the last commission, who might inquire what sums of money, goods, or securities, &c. the defendant had received of the bankrupt since the issuing of the first commission, and that all which they should find to have been so received might be paid by the defendant to such persons as the commissioners should appoint for the purposes of the statute, &c. and that the defendant might pay to the plaintiff the costs of the application. Whereupon the Lord Chancellor had ordered the first commission to be superseded, and the proceedings under it deposited, &c. and the 19l. 13s. 4d., the costs of such first commission, paid by the bankrupt to the defendant for the same, to be repaid by the defendant to the plaintiff, and that the bond entered into by the defendant to the Lord Chancellor should be assigned to the plaintiff, and the defendant pay to the plaintiff all the costs of and occasioned by the several matters aforesaid, with the costs of the application, &c. To this there was a general demurrer and joinder.

Lawes, in support of the demurrer (after observing that the replication was defective in not traversing any matter in the plea), proceeded to support the plea, the validity of which was the principal question. This is not a case within the stat. 5 Geo. 2. c. 30.

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f. 23. (a); for the remedy given by that clause is confined, as far as respects question, to cases where the commission issues either *fraudulently* (i. e. as against creditors), or *maliciously* (i. e. as against the bankrupt himself); in either of which cases the Lord Chancellor may, upon petition of *the party grieved*, examine into the same, and order *satisfaction* to be made to him for the *damages by him sustained*; and for the better recovering *thereof* (i. e. of the actual *damages sustained by the party grieved*), the Lord Chancellor may, if there be occasion, assign the bond, before directed to be entered into by the petitioning creditor upon the suing out of the commission, to the party so petitioning, who may sue upon the same in his own name. If therefore it appear upon the record, that the party suing is not a party grieved, or, what is the same thing, if he had been aggrieved, yet that he has received compensation for his damage, this action on the bond cannot be sustained. Now here it does not appear by the Lord Chancellor's order that any money had been improperly received by the defendant of the bankrupt. The fact is indeed stated in the petition recited in the order, but it is not alleged to be true in the order itself. But taking the fact to be so, the only damage which could be sustained by the creditors at large was the exact amount of the money so improperly withdrawn from the bankrupt's estate, for which there were two re-

(a) By that clause it is enacted, "for preventing the taking out
" commissions of bankrupts *maliciously*, that no commission of bankrupt
" shall be awarded and issued out against any person whatsoever upon the
" petition of one or more creditors unless (the debt be of a certain amount
" therein specified), and the creditor or creditors petitioning for such
" commission shall, before the same shall be granted, make an affidavit,
" (or affirmation in writing) before one of the Masters in Chancery of
" the truth of such their respective debt and debts; likewise give bond
" to the Lord Chancellor, &c. in the penalty of 200*l.* to be conditioned
" for proving their debts, &c. in case the due issuing forth of the same
" shall be contested, &c. and also for proving the party a bankrupt, &c.
" And if such debt or debts shall not be really due or owing, or if after
" such commission taken out, it cannot be proved that the party was a
" bankrupt, &c. but on the contrary it shall appear that such commis-
" sion was taken out *fraudulently* or *maliciously*, that then the Lord
" Chancellor, &c. shall and may, upon the petition of the *party or parties grieved*, examine into the same, and order *satisfaction* to be made
" to him, her, or them, for the *damages by him, her, or them sustained*;
" and for the better recovery *thereof* may, in case there be occasion, assign
" such bond or bonds to the party or parties so petitioning, who may
" sue for the same in his, her, or their name and names; any law,
" custom, or usage to the contrary notwithstanding."

medice

medies at law, without having resort to the assignment of the bond, which was only intended to give a legal remedy against the party's estate, where none was before, for such damages as the Lord Chancellor has or may assess. But the assignees under the new commission might have maintained an action for money had and received to recover the sum so received, or the defendant might have been proceeded against on the 24th section of the act, which provides that the party so receiving such satisfaction "shall forfeit and lose as well his whole debt as the whole he shall have taken or received, and shall pay back the same to such person as the commissioners acting under the new commission shall appoint, in trust for the bankrupt's creditors." This then is not one of those cases where it was necessary to resort to the Lord Chancellor in order to assess the damages, and to recover which the bond was to be assigned, if necessary; because here the damage was in its own nature certain, and the same law has pointed out a specific mode of redress. But whatever doubt there might have been, whether this particular plaintiff, standing only in the general relation of a creditor to the bankrupt's estate, or an assignee under the new commission, be a party grieved within the clause empowering the assignment of the bond; or whatever doubt there might have been, if the sum directed to be refunded by the Lord Chancellor had not been paid; yet as the bond can only be assigned to recover the particular damages assessed by the Lord Chancellor; (though if he please he may, instead thereof, assign the bond generally, which will be taken, according to *Smith v. Broomhead* (a), and ex parte *Gayter* (b), to be an assignment of the whole penalty by way of damage); and as it appears that his Lordship has in this case assessed the damage by ordering the money received to be refunded, and the costs of the former proceeding to be paid; and as the whole of this has been already satisfied; the bond which was assigned in order to secure those payments is discharged; and the Lord Chancellor having once exercised his judgment in assessing the damages is functus officio, and cannot award any new satisfaction ultra the damages so before assessed. And it is clear from the authorities cited that the jury cannot give any other damage upon the bond but the sum assessed by the Lord Chancellor. In *Smith v. Broomhead*, no damages had been assessed, which differs that case from the present, and therefore the plaintiff could only recover the penalty,

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If then this case be sent to a jury to assess the damages, as it ultimately must, in case the Court over-rule the demurrer; [the Court appearing to dissent from this, he added] or if the Court, without the intervention of a writ of inquiry, give judgment, the amount of the damage assessed by the Lord Chancellor, the defendant will be obliged to pay the amount twice over.

Wood contra. The object of the replication was to shew the Court the true state of the case, the plea having garbled the petition which discloses it. It appears then that the defendant, having colluded with the bankrupt to sue out a fraudulent commission, received from the latter the expences of suing it out, &c. The Lord Chancellor, upon a hearing of the matter, directed in the first place that the money so received should be refunded, and that the defendant should pay to the assignee under the new commission the costs of suing it out; and further as a satisfaction to the creditors for the injury sustained by the suing out the fraudulent commission by which they were to be defrauded or delayed of their just demands, his Lordship directed the bond to be assigned, in order to recover against the defendant the whole penalty. And such intention was expressed at the time of making the order: for when it was prayed on behalf of the defendant that the matter might be referred to a master to ascertain the amount of the damage, his Lordship refused it, and said that the assignee should have the whole penalty (a). And it was decided in the cases cited, *ex parte Gayter*, and *Smith v. Broomhead*, that if the bond be assigned generally, the assignee must recover the whole penalty; as none but the Lord Chancellor can assess the damages. It is plain from the statement of the case, that the plaintiff as a creditor must be a party grieved by the suing out a fraudulent commission. Besides which, he is so averred to be in the declaration, and the defendant should have denied that fact, if it were otherwise. Then as to the necessity of a writ of inquiry to assess the damage, that was denied by *Lawrence J.* in the last-mentioned case, who said that such a bond was not within the statute of King *William*. But at any rate that would be no cause of demurrer, being a subsequent proceeding.

Lawes, in reply, said that no other motive could be attributed to the Lord Chancellor for assigning the bond than what was ex-

(a) It was objected *à contra* that this was going out of the order as stated on the record: but it was answered that it might be referred to as a note of a judicial opinion of the Lord Chancellor in a case pending before him.

pressed on the face of the order: and the only reason apparent there is that which is also to be found in the statute, namely, to furnish the assignee with a legal remedy to recover the damage assessed by his Lordship; and that has been already paid. Admitting therefore that the plaintiff was once a party grieved, he has already received his recompence.

Lord ELLENBOROUGH Ch. J. This is an action to recover the penalty of a bond which the Lord Chancellor is empowered by the stat. 5 Geo. 2. c. 30. s. 23. to take on the issuing of any commission of bankrupt from the creditor petitioning for the same, conditioned for proving his debt, and also for proving the party a bankrupt at the time of taking out such commission, and further to proceed as is therein after-mentioned: and then the statute directs that if such debt (that is, the petitioning creditor's debt), shall not be due, or if it cannot be proved that the party were a bankrupt at the time, but on the contrary it shall appear that the commission was taken out fraudulently or maliciously; then the Lord Chancellor may upon petition of the party grieved, examine into the same and order satisfaction to be made to him, &c. for the damages by him sustained; and for the better recovery thereof, in case there be occasion, assign such bond to the party petitioning, &c. It appears then in the first place that if there be a default made in any one of the matters, which, by the condition of the bond is made necessary to be satisfied, the bond is forfeited. The statute says, if it *appear* that such commission were taken out *fraudulently* or maliciously: Now to whom is it to appear, but to the *Lord Chancellor*, or keeper, &c.? That is, to the person who, upon petition of the party grieved, is required to *examine* into the same. If it appear to his conscience and satisfaction that the party grieved has sustained damage, he is, for the better recovery *thereof*, to assign the bond to the party grieved. It is objected here that the plaintiff is not a *party grieved*; but he appears to be a creditor of the bankrupt; and every creditor may be said to be a party grieved by the suing out of a fraudulent commission, which may intercept or delay the just distribution of the bankrupt's estate; and more particularly as this plaintiff appears to be appointed assignee under the subsequent commission. No doubt, therefore, he is a party grieved, and as such a proper person to whom the bond might be assigned. It is equally clear that the Lord Chancellor may proprio vigore ascertain the amount of the damages sustained by the party grieved

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without any suit instituted for that purpose, or the intervention of a jury. And for the recovery thereof he is authorised to assign the bond of the petitioning creditor: the reason of which was, that the order of the Lord Chancellor upon the party to pay the damage so ascertained would only attach upon his person and not upon his estate; and therefore in case of his contumacy it was thought expedient to have effectual means of enforcing such order, by giving a remedy at law which would bind his property. Then it is objected that the Lord Chancellor having had one examination of the matter, and having ordered certain sums to be refunded to the bankrupt's estate, and costs to be paid, must be taken to have assigned the bond, in order to enforce the payment of those sums, and that he has precluded himself from re-investigating the question, and ordering any further sum to be paid by way of damage to the party grieved, out of the penalty of the bond. But it does not appear to me that such is the meaning of the act, or that the Lord Chancellor has precluded himself from reviewing his own order made upon the former examination. But that if he find that the party grieved has been damnified, it is competent to him to assign the bond, and he may, upon a further examination ascertain whether the damage sustained amount to the whole or what part of the penalty; and the only purpose of such assignment is to give the party grieved a legal lien for his damages on the obligor's estate. There are no restrictive words in the statute confining the amount of the damages to be recovered on the bond to such specific sum as the Lord Chancellor shall have previously ascertained. But, as is said in *Smith v. Broomhead* (a), he may either in the first instance assign the bond, or he may direct an inquiry before the master to ascertain the amount of the damage sustained, or an issue at law upon a quantum damnificatus to be tried; or he may order the whole or any part of the penalty to be paid. Neither is he bound by the original assessment of the damages; but if he afterwards see that damages to the whole extent of the penalty have been sustained, he may order the whole, instead of a part, to be paid. Then as to the statute 8 & 9 W. 3. (c. 11. s. 8.) I do not think this is a bond within it, for it is admitted that the Lord Chancellor may himself assess the damages, which it is the province of the jury to do in cases under that statute; which is in itself an answer to

(a) 7 Term Rep. 304.

the argument. Indeed the power of assessing the damages is, by that statute, specifically given to the Lord Chancellor. If the bond be forfeited, he may assess the damages to the extent of the whole or any part of the penalty, and is not confined to the terms of his original order. All then that the obligor can do at law, who is sued by the assignee of the bond, is either to deny by his plea that he executed the bond, or that it was assigned, or to plead performance of the condition, or payment of the whole sum directed by the Lord Chancellor. But if the condition be broken, the assignment of the bond will enable the plaintiff to recover judgment, which will remain as a security for the damages assessed or to be assessed by the Lord Chancellor: and as he has assigned the bond generally in this instance without any abridgment of the amount of the damage sustained, we must take it that he has ordered the whole penalty to be recovered at law; whatever subsequent directions he may think proper to give.

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GEORGE J. The case of *Smith v. Broomhead* is a direct answer to the arguments urged on behalf of the defendant, and this case is an attempt to revise that authority. But I perfectly agree to the construction of the act there given, and to what was said by my Brother *Lawrence*, that this is not a bond within the statute of King *William*. The Lord Chancellor also put the same construction on the act of *Geo. 2.* in this very case, and evidently thought, by what he said at the time of making the order, that the whole penalty was recoverable at law by the plaintiff, the assignee.

LAWRENCE J. When the case of *Smith v. Broomhead* was before the Court, I said that it was not a case within the statute of King *William*, because the damages were to be ascertained by the Lord Chancellor exclusively; whether he thought proper to ascertain them himself, or referred the inquiry to a master under his own directions, or to a jury, subject afterwards to his control; and that the damages were not to be ascertained by a jury under the authority of a court of common law. And indeed the argument of the defendant's counsel has proceeded upon this assumption; for it is not now contended that we are to assess the damages with the assistance of a jury, but it is said that the Lord Chancellor has already ascertained them, and that he meant by his order to say that the assignment of the bond was only to enforce payment of the costs of the petition, and of the 19*l.* 13*s.* 4*d.* which had been paid by the bankrupt to the defendant. Then

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are we so to understand the order? I think not. For the petition, besides praying that the several sums of money received by the defendant from the bankrupt's estate should be refunded, and the commission be superseded, and the costs of the application be paid by the defendant, submits further that the bond in question should be assigned, *the same being forfeited*. And the Lord Chancellor, by his order founded thereon, directs the commission to be superseded, and the 19*l.* 13*s.* 4*d.* to be paid, and does *further order* that the bond be assigned to the plaintiff, and the defendant to pay the costs of the application. What use is hereafter to be made of the judgment of this Court in the Court of Chancery it is not now necessary to consider; but it could not be meant to secure the payment of the costs of the application in that Court. If then the condition of the bond be not performed, the bond is forfeited; and if so, the plea is no answer to the breach. What the consequence of the judgment here is to be is for the Lord Chancellor, and not for us, to consider; for I agree with my Lord, that the Lord Chancellor will not be tied up by his former order from considering whether the whole or what part of the penalty shall be paid to the creditors.

LE BLANC J. The objection made is, that the plaintiff on these pleadings appears to have been aggrieved, if at all, only to a certain extent, and that he has been already indemnified up to that extent; and therefore that he is not entitled to recover any further compensation on the bond. That brings the question to the construction of the Lord Chancellor's order; whether the argument be founded in fact, which assumes that the plaintiff was only damnified to the extent of the money actually paid out of the bankrupt's estate, and that the Lord Chancellor had ascertained the damages to that extent only, and had assigned the bond merely for the recovery of those damages and the costs of the application? But it is impossible to understand the language of the order in that sense. Nor is the assignment of the bond so confined in its object by the statute. For it expressly directs the bond to be taken in a *limited* sum, which might be less than the money fraudulently received: and the Lord Chancellor may assign it to the party grieved in satisfaction of the *damages* by him sustained, which *includes* something beyond the actual loss of money. It is, however, contended to be a bond of indemnity; and it is so to a certain extent; but it is to indemnify the party grieved for such damages as the Lord Chancellor shall ascertain,

not

not such as are to be ascertained by a jury. But if his Lordship had meant that the bond was to be assigned only to secure the payment of the money received and the costs taxed, he would have said so in terms; but that is not the language of the order. The person damnified may be either the bankrupt or a creditor, as the commission is malicious or fraudulent. It appears that the Lord Chancellor thought this a fraudulent commission taken out with the connivance of the bankrupt, and therefore that the creditors were the parties grieved, and not the bankrupt. It is clear that a creditor may be injured by a fraudulent commission far beyond the mere costs of suing it out: and so it appeared to the Lord Chancellor in this case; and therefore he ordered the bond to be assigned for those *damages*, and not for the particular sum which had been paid out of the bankrupt's estate, which he had besides directed to be repaid, together with the costs, by the defendant. It is not necessary now to say whether such a bond fall within the stat. 8 & 9 *W.* 3., though, as it appears to me, it does not. For though it may be a bond of indemnity to a certain extent, yet it is to indemnify against such damages as the Lord Chancellor shall ascertain, and not such as shall be found by a jury. If the Lord Chancellor only intended that the bond should be assigned for the recovery of the specific sum of 19*l.* 13*s.* 4*d.* and the costs of the petition, it was open to the defendant, on the payment of those sums, to have applied to his Lordship, who would have ordered a stay of proceedings. On the face of the order, as it now stands, we must take it that by the assignment of the bond generally the whole penalty was intended to be recovered.

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Judgment for the plaintiff.

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Saturday,
Nov. 13th.

ELWES against MAW.

A tenant in agriculture, who erected at his own expence and for the mere necessary and convenient occupation of his farm, a *beast-house*, *carpenter's shop*, *fuel-house*, *cart-house*, *pump-house*, and *fold-yard wall*, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same; though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine: but where it is accessory to the realty, it can in no case be removed.

THE declaration stated that the plaintiff was seized in fee of a certain messuage, with the out-houses, &c. and certain land, &c. in the parish of *Bigby*, in the county of *Lincoln*, which premises were in the tenure and occupation of the defendant as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, &c. intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof, wrongfully and injuriously, and without the licence and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his, the defendant's, tenure and occupation, viz. a *beast-house*, a *carpenter's shop*, a *waggon-house*, a *fuel-house* and a *pigeon-house*, and a *brick wall*, inclosing the fold-yard, and took and carried away the materials, which were the property of the plaintiff, as landlord, and converted them to his, the defendant's own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial at the last *Lincoln* assizes a verdict was found for the plaintiff, with 60*l.* damages, subject to the opinion of the Court on the following case:

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, outhouses, and lands, at *Bigby*, in the county of *Lincoln*, under a lease from the plaintiff for 21 years, commencing on the 12th day of *May* 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said messuage, barn, stables, and outhouses, and other buildings belonging to the said demised premises. About 15 years before the expiration of the lease the defendant erected upon the said farm at his own expence a substantial *beast-house*, a *carpenter's shop*, a *fuel-house*, a *cart-house*, and *pump-house*, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundation of them were about one foot and a half deep in the

ground.

ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections *were necessary and convenient for the occupation of the farm*, which could not be well managed without them. The question for the opinion of the Court was, Whether the defendant had a right to take away these erections. If he had, then a verdict to be entered for the defendant: if not, the verdict for the plaintiff to stand.

This case was first argued in *Easter* term last by *Torkington* for the plaintiff, and *Clarke* for the defendant; and again in this term by *Vaughan, Serjs.* for the plaintiff, and *Balguy* for the defendant.

For the plaintiff it was argued that the removing the buildings in question was waste at common law, and that this case did not fall within any of the exceptions, which had been introduced *solely for the benefit of trade* in relaxation of the old rule. That rule was, that whatever was once annexed to the freehold could never be severed again without the consent of the owner of the inheritance. Accordingly, glass windows, wainscot, benches, doors, furnaces, &c. though annexed by tenant for years for his own accommodation, could not be removed by him again. *Co. Lit. 53. a.* The principle on which this was founded was the injury which would thereby arise to the inheritance from disfiguring the walls of the mansion; though some of these things were in their nature personal chattels, supplying the place of mere moveable utensils and furniture. But it never was questioned but that buildings let into the soil became part of the freehold from the very nature of the thing. This was decided so long ago as *Hil. 17 Ed. 2. 518.* in a writ of waste against a lessee, who had built a house and pulled it down during his term. And *Co. Lit. 53. a.* which is to the same purpose, goes further and says, that even the building of such new house by the tenant is waste; but that is denied in *Lord Darcy v. Askwith (a)*; though that also agrees that the letting down of such new house built by

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the tenant himself would be waste. So taking down a stone wall, or a partition between two chambers, is waste. 10 *Hen. 7. 2. pl. 3.* It does not indeed appear by that book, whether those erections had been before made by the tenant himself: but they were so taken to be by *Meade J.* in *Cooke v. Humphrey (a)*. All this is confirmed by Lord *Coke* at the end of *Herlakenden's case (b)*, where it is said to have been adjudged in *C. B.* that glass fastened to the windows, or wainscot to the house, by the lessee, cannot be removed by him: and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws, or irons put through the posts or walls (as had been then of late invented), or in whatever other manner it was fastened to the posts or walls of the house. In all these cases the rule as between landlord and tenant seems to have been followed that between heir and executor, founded upon the reason first mentioned: and no innovation upon the strict rule seems ever to have been admitted, except in the case before Lord *C. B. Comyns (c)*, at *Nisi Prius*, of the cyder mill, which he held should go to the executor, and not to the heir; but upon what particular grounds does not appear: and the case of *Culling v. Tufnal (d)*, before Lord *Ch. J. Treby*, at *Hereford*, in 1694, where a barn erected by a tenant upon pattins and blocks of timber, lying on, but not let into, the ground was holden to be removable by the tenant: but even there he relied on the custom of the country in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted. The only established exception (which the plaintiff's counsel admitted was as old as the rule itself), is in favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In 20 *Hen. 7. fo. 13, pl. 24.* an heir brought trespass against executors for taking away a furnace fixed to the freehold with mortar, and the taking was holden tortious. But it was there said "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business (e), during the term he may remove them: but if he suffer them to be fixed to the land after the end of the term, then they belong to the lessor; and so of a baker. Then fol-

(a) *Moor*, 177.(b) 4 *Rep.* 63, 4.(c) Cited in *Lawton v. Lawton*, 3 *Atk.* 13. 16. (d) *Bull. N. P.* 34.

(e) The words in the original are "pur occupier ion occupation."

lows, "It is no waste to remove such things within the term by any." But this is said to have been against the opinions before-mentioned, and to have been doubted in the 42 *Ed. 3.* (p. 6. pl. 19.) whether it were waste or not. It is clear, therefore, from the whole of the passage, that the only generally admitted exception was in favour of traders, which is shewn by the examples of the dyer and baker affixing vessels *pur occuper son occupation*: and that at least it was doubtful whether the same privilege extended to others affixing to the freehold similar articles. And the exception is the more remarkable because at that early period agriculture must have been of much greater importance to the state than trade. This distinction was continued in later times. In *Poole's case* (a), *M. 2 Ann.* in an action on the case by a lessee against the sheriff of *Middlesex*, who had taken in execution the vats, coppers, tables, partitions, and pavement, &c. of an under lessee, a soap boiler, which he had put up as fixtures for the convenience of his trade, Lord Ch. J. *Holt* held that during the term the soap boiler might well remove the vats set up in relation to trade, by the common law: but that there was a difference between what he did to carry on his trade, and what he did to complete the house; as hearths, and chimney pieces; which he held not removable. The next case was *Cave v. Cave* (b), in 1705, where the Lord Keeper held that not only wainscot, but pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor, to prevent the house being disfigured. Then followed *Lawton v. Lawton* (c); where it was decreed by Lord *Hardwicke* C. that a fire engine erected for the benefit of a coal-ery by the tenant for life should be considered as personal estate, and go to his executor, and not to the remainderman, in favour of creditors. But there it was proved to be *customary* to remove such an engine; that in building the shed for its security *holes were left* for the ends of the timber *to make it more commodious for removal*; and that it was very capable of being removed. The evidence relied on by the other side was that it could not be removed without tearing up the *soil* and destroying the *brick work*. But Lord *Hardwicke* considered the brick work there as a mere *accessary* to the engine, which in its own nature was a mere personal moveable chattel. One reason, he said, which weighed with him was, that it was a *mixed case*, between enjoying the

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profits of the land and carrying on *a species of trade*; and considering it *in that light*, it came near the instances of furnaces and coppers in brew-houses. That decision was in 1743. In *ex parte Quincy (a)*, in 1750, where the principal question was, whether the *utensils* of a brew-house passed by a mortgage of the brew-house with the *appurtenances*; it is said that a tenant may, during the term, take away *chimney pieces*, and even *wainscot*; but the latter is observed to be a very strong case. The same was before said in *Lawton v. Lawton*, with this difference, that it was there said of wainscot *fixed only by screws*, and of *marble chimney pieces*. This opinion may have proceeded as it did in *Beck v. Robow (b)*, upon the consideration that matters of this sort were merely *ornamental furniture*, and not necessary to the enjoyment of the freehold. The case of *Lord Dudley v. Lord Ward (c)*, in 1750, was like that of *Lawton v. Lawton*, on the authority of which it was decided. There Lord *Hardwicke* recognized the general rule, with the single exception as between landlord and tenant, that fixtures annexed by the latter *for the sake of trade* might be removed. There too the fire engine was considered as the *principal*, and the building erected over to preserve it, as the mere *accessory*: and the coal-ery itself as in part the carrying on of *a trade*. In *Lawton v. Salmon, E. 22 Geo. 3. B. R. (d)*, *salt pans* were holden to go to the heir and not to the executor: and though Lord *Mansfield* said that the rule had been relaxed as between landlord and tenant, tenant for life and remainderman, in respect of things put up by the tenant in possession; still he confined the relaxation to things so affixed *for the benefit of trade*. And he there alluded to the case of the cyder-mill (doubtfully) as standing alone, and not printed at large. Then the case of *Dean v. Allalley (e)*, fittings after *Easter*, 39 *Geo. 3.* was a case where two sheds, called *Dutch barns*, which had been erected by the tenant during his term were removed by him: and being sued on his covenant, by which he undertook to leave all buildings which then were or *should be erected* on the premises during the term in repair, Lord *Kenyon*, at *Nisi Prius*, held that buildings of that description were not included; and said that the

(a) 1 *Ark.* 477. (b) 1 *P. Wms.* 94.

(c) *Ambl.* 113. and *Bull. N. P.* 34.

(d) Cited in a note to *Fitzherbert v. Shaw*, 1 *H. Blac.* 259. The principal case turned on a particular agreement.

(e) 3 *Espin. Ni. Pri. Caf.* 11.

law would make *the most favourable construction for the tenant where he had made necessary and useful erections *for the benefit of his trade or manufacture*. Of what precise description the buildings there were does not appear; possibly not affixed to the ground (a), at least not such parts as were removed. If not, the case amounts to no more than that of *Penton v. Robart* (b), where a *varnish house* of wood which had been erected on a brick foundation by the tenant, *for the purpose of carrying on his trade*, was removed by him. But it did not appear there that the *foundation* was removed, but only the *superstructure of wood*, which had been *brought by the tenant from another place*, where he had before carried on his business. Lord *Kenyon* indeed there laid stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting green-houses, &c.: which he considered that they would be at liberty to remove: Whether that be done under particular agreements or not does not appear: but supposing the law would imply an exception in favour of tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade; the very nature of their occupation and of the letting being to enable them to disannex even trees from the land (c). But none of the cases have gone the length now contended for; and the very grounds on which exceptions have been made from the general rule preclude the present case. Erections of this sort are not in their nature temporary nor moveable, but are calculated solely for the enjoyment of the land: the expence of erecting them is great, and their value is great on the spot, but of trifling consideration when removed: the injury of their removal therefore is much greater to the landlord than the benefit of the materials when removed are to the tenant. If the exception were extended to buildings erected for the purposes of agriculture, it would be as extensive as the rule itself, and would therefore destroy it. The sole object of such erections is for the purpose of enjoying the produce of the land; the *land*

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(a) Vide *post*. what account was given of this case in the arguments of the defendant's counsel.

(b) *Ante*, 2 vol. 88.

(c) *Lawrence J.* on the first argument intimated; that if ground were let expressly for *nursery* ground, it might be considered as implied in the terms of the contract that it was to be used for taking up young trees &c. as is usual in such cases. But he expressed a wish to be informed of the usual terms of the leases under which such grounds were holden in the neighbourhood of the metropolis.

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therefore is the principal, and the buildings the *accessory to the land*. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the *personal chattel* is the principal. No other line than this can be drawn without overthrowing all the authorities.

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For the defendant it was contended that the old rule of law had been gradually relaxed between landlord and tenant, though not so much between tenant for life and remainderman, or between heir and executor. The object has been to encourage tenants to lay out their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the state as well as the individuals, and applies at least as strongly to tenants in husbandry as in trade. Agriculture in the improved state in which it is now carried on is in itself a trade; it requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to market. But unless the tenant is entitled to take away with him at the end of his term, or have a compensation in value for buildings like these in question erected in such a manner as to be capable of being removed at pleasure and set up on any other farm, he will not be at the expence of erecting them at all: and therefore though he, and through him the public, will suffer, yet the landlord will not be the better for the right which he now claims. This is no question whether permanent additions or improvements made by a tenant to the old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation, are to be removed at the end of the term; for not even persons renting premises for the purpose of carrying on trades have any such privilege: but whether buildings so erected for the sole purpose and convenience of carrying on the farm, that is, of turning to the best account the capital and industry of the farmer in his trade or business may not be removed by him. The materials of which the buildings are composed cannot vary the law, but the objects and interests of the persons concerned. If in the case of *Dean v. Allalley (a)*, the tenant was entitled to remove the buildings called *Dutch barns*, the same rule will apply to the

(a) 3 *Esq. N. Pri. Cas.* 11. and MS.

buildings in question, which are as much calculated for removal. For in that case (as appears from the MS. note of one of the counsel in the cause), the sheds erected "had a foundation of brick in the ground, and uprights fixed in and rising from the brick work, and supporting the roof, which was composed of tiles, and the sides open," as in the present case. If the exception be confined to erections for the benefit of trade, Lord *Kenyon* in that case considered the *Dutch* barns as coming within that description. This is consonant to the opinion delivered by the same learned Judge in *Penton v. Robart* (a). It is true that was the case of a *varnish house*; but it is clear that his lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for the instances put by him in illustration of his opinion are cases of gardeners and nurserymen whose profits are derived out of the immediate produce of the land: and the buildings now in question are no more annexed to the soil than the varnish house there was, which was on a foundation of brick, or than the hot-houses and green-houses of the persons alluded to. But the argument does not rest alone on very modern cases, but is strongly supported by the decisions of Lord *Hardwicke* in the cases of *Lawton v. Lawton* (b), and Lord *Dudley v. Lord Ward* (c). There, even as between tenants for life or in tail and the remaindermen, the executors of the former were holden entitled to the fire engines of collieries; buildings which must in their very nature be annexed to the soil, and without which the profits of the land, viz. the coal, could not be taken. Those were indeed said to be mixed cases between taking the profit of land and carrying on a trade, but wherefore mixed does not so plainly appear. So the case of the cyder mill is directly in point: that is as essential to the enjoyment of the land in that particular species of produce out of which the cyder is to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture land. That case was much stronger than what is now contended for; the question arising there between the heir and executor, where it may be admitted that the old rule has prevailed much stricter. All the cases therefore in the books between persons standing in that relation may well be laid out of the question, as they turn upon the presumed intention of the an-

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(a) *Ante*, 2 vol. 88.(b) 3 *Atk.* 13.(c) *Ambli.* 113.

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cestor or testator in favour of the heir, that the inheritance should descend to him entire and undefaced. But the case of *Culling v. Tufnal* (a), before Lord Ch. J. *Treby*, which is in point, was between landlord and tenant. That was the case of a barn removed by the tenant: and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It is true that case was put by him on the ground of the custom of the country; but *Buller J.*, in citing it, observes that now, without any custom, it would be determined in favour of the tenant without any difficulty; for that the old rule had been relaxed as between landlord and tenant, &c. though still preserved as between heir and executor. No distinction is there hinted at between trade and agriculture. In *Fitzherbert v. Shaw* (b), the question, it is true, turned at last on the agreement; but *Gould J.* was decidedly of opinion at the trial, that if the tenant had removed the buildings during the term, he would have been justified in so doing; and there some of the things removed were a shed built on brick work, and some posts and rails erected by the tenant, all which must have been let into the ground, and were adapted to purposes of agriculture. Upon the whole they contended that the only line to be drawn from all the books was, that whatever buildings were erected by a tenant (be the materials what they may, or however placed in or upon the ground), for the immediate purposes of his trade, or for the more advantageous taking or improving the profits of his farm, he may remove them again, provided he leave the premises on his quitting as he found them. According to this rule, no injury could ensue to the landlord, whose property would, on the contrary, be eventually benefited by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant who had held under a term for 21 years a farm consisting of a messuage, and lands, out-houses, and barns, &c. thereto belonging, and who, as the case reserved stated, during the term and about

(a) *Bull. N. P.* 34.(b) 1 *H. Blac.* 258.

15 years

15 years before its expiration, erected at his own expence a *beast-house*, *carpenter's shop*, a *fuel-house*, a *cart-house*, a *pump-house*, and *fold yard*. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and half deep in the ground. *The carpenter's shop* was closed in, and the other buildings were open to the front and supported by brick pillars. *The fold yard wall* was of brick and mortar, and its foundation was in the ground. The defendant previous to the expiration of his lease pulled down the erections, dug up the foundations, and carried away the materials; *leaving the premises in the same state as when he entered upon them*. The case further stated, that these erections were *necessary and convenient for the occupation of the farm*, which could not be well managed without them. And the question for the opinion of the Court was, Whether the defendant had a right to take away these erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. 1st, Between different descriptions of representatives of the same owner of the inheritance; viz. between his *heir* and *executor*. In this first case, i. e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, any thing which has been affixed thereto. 2dly, Between the *executors of tenant for life or in tail*, and the *remainderman or reversioner*; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The 3d case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

But the *general rule* on this subject is that which obtains in the first-mentioned case, i. e. between heir and executor; and that rule (as found in the year book 17 E. 2. p. 518., and laid down at the close of *Herlakenden's case*, 4 Co. 64., in Co. Litt. 53. in *Cooke v. Humphrey Moore* 177., and in *Lord Darby v. Asquith*, Hob. 234. in the part cited by my brother *Vaughan*, and in other cases;)

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is that where a lessee, having *annexed* any thing to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which * were at last effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book 42 E. 3. 6. the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 H. 7. 13. a. & b. which was the case of trespass against executors for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or "a dyer make his vats or vessels to occupy his occupation during "his term, he may remove them: but if he suffer them to be fixed "to the earth after the term, then they belong to the lessor. And so "of a baker. And it is not waste to remove such things within "the term by some: and this shall be against the opinions afore- "said." But the rule in this extent in favour of tenants is doubted afterwards in 21 H. 7. 27., and narrowed there, by allowing that the lessee for years could only remove, within the term, things *fixed to the ground, and not to the walls* of the principal building. However in process of time the rule in favour of the right in the tenant to remove *utensils set up in relation to trade* became fully established: and accordingly, we find Lord Holt, in *Pool's case*, Salk. 368, laying down, (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c. fixed had been taken in execution, and on which account the first lessee had brought an action against the sheriff,) that *during the term the soap-boiler might well remove the vats he set up in relation to trade*; and that he might do it by the common law, and not by virtue of any special custom, *in favour of trade, and to encourage industry*; but that after the term they became a gift in law to him in reversion, and were not removeable. He adds, that there was a difference between what the soap-boiler did *to carry on his trade*, and what he did to complete *his house*, as *beartbs and chimney-pieces*, which he held not removeable. The indulgence in favour of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. *Beck v.*

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Rebow, 1 P. Wms. 94. *Ex parte Quincy*, 1 Atk. 477. and *Lawton v. Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removeable by an executor of tenant for life, nor by the tenant himself who built them during his term.

In deciding whether a particular fixed instrument, machine, or even building should be considered as removeable by the executor, as between him and the heir, the Court, in the three principal cases on this subject, (viz. *Lawton v. Lawton*, 3 Atk. 13. which was the case of a fire engine to work a colliery erected by tenant for life: *Lord Dudley and Lord Ward, Ambler* 113., which was also the case of a fire engine to work a colliery erected by tenant for life: (these two cases before *Lord Hardwicke*;) and *Lawton, executor, v. Salmon*, E. 22 G. 3. 1 H. Blac. 259. in *notis*, before *Lord Mansfield*; which was the case of salt pans, and which came on in the shape of an action of trover brought for the salt pans by the executor against the tenant of the heir at law) the Court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil, (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire engine, in the cases in 3 Atk. and *Ambler*, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. *Lord Hardwicke* says in the case in *Ambler*, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade." And in the case in 3 Atk. he says, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade; and considering it in this light, it comes very near the instances in *brew-houses*, &c. of furnaces and coppers." Upon the same principle, *Lord Ch. B. Comyns* may be considered as having decided the case of the cyder mill; i. e. as a mixed case between enjoying the profits of the land and carrying on a species of trade; and as considering the cyder mill as properly an accessory to the trade of making cyder.

In the case of the salt pans, *Lord Mansfield* does not seem to have considered them as accessory to the carrying on a trade; but as merely the means of enjoying the benefit of the inheritance. He says, "*the salt spring is a valuable inheritance*, but

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“no profit arises from it unless there be a salt work; which
“consists of a building, &c. for the purpose of containing the
“pans, &c. which are fixed to the ground. *The inheritance con-*
“*not be enjoyed without them. They are accessaries necessary to the*
“*enjoyment of the principal. The owner erected them for the benefit*
“*of the inheritance.*” Upon this principle he considered them as
belonging to the heir, as parcel of the inheritance, for the en-
joyment of which they were made, and not as belonging to the
executor, as the means or instrument of carrying on a trade. If,
however, he had even considered them as belonging to the exe-
cutor, as utensils of trade, or as being removable by the tenant,
on the ground of their being such utensils of trade; still it would
not have affected the question now before the Court, which is
the right of a tenant for mere agricultural purposes to remove
buildings fixed to the freehold, which were constructed by him
for the ordinary purposes of husbandry, and connected with no
description of trade whatsoever: and to which description of
buildings no case (except the Nisi Prius case of *Dean v. Allaly*,
before Lord Kenyon, and which did not undergo the subsequent
review of himself and the rest of the Court), has yet extended
the indulgence allowed to tenants in respect to buildings for the
purposes of trade. In the case in *Buller's Nisi Prius*, 34. of
Culling v. Tuffnell, before Ch. J. Treby, at Nisi Prius, he is stated
to have holden that the tenant who had erected a barn upon the
premises, and put it upon *pattens and blocks of timber lying upon the*
ground, but not fixed in or to the ground, might by the custom of
the country take them away at the end of his term. To be sure
he might, and that without any custom; for the terms of the
statement exclude them from being considered as fixtures; “they
“were not fixed in or to the ground.” In the case of *Fitzberbert*
x. Shaw, 1 H. Blac. 258, we have only the opinion of a very
learned Judge indeed, Mr. Justice Gould, of what *would have*
been the right of the tenant, as to the taking away a *shed built on*
brick-work, and some *posts and rails* which he had erected, if the
tenant had done so during the term: but as the term was put an
end to by a new contract, the question what the tenant could
have done in virtue of his right under the old term, if it had con-
tinued, could never have come judicially before him at Nisi
Prius: and when that question was offered to be argued in the
Court above, the counsel were stopped, as the question was ex-
cluded

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cluded by the new agreement. As to the case of *Penton v. Robart*, 2 East. 88, it was the case of a *varnish house*, with a brick foundation let into the ground, of which *the wood work had been removed from another place*, where the defendant had carried on his trade with it. It was a building for the purpose of trade; and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning which obtains in modern times in favour of the *interests of trade*; upon which ground it might be properly supported; goes further, and extends the indulgence of the law to the erection of green-houses and hot-houses by nurserymen, and indeed by implication to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognized opinion or practice on either side of *Westminster Hall*, to warrant such an extension. The Nisi Prius case of *Dean v. Allaly* (reported in Mr. Woodfall's book, p. 207. and Mr. Espinasse's, 2 vol. 11.) is a case of the erection and removal by the tenant of two *sheds*, called *Dutch barns*, which were, I will assume, unquestionably fixtures. Lord Kenyon says, "the law will make the most favourable construction for the tenant, where he has made necessary and useful erections, for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cyder-mills, and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removeable at the end of the term." Lord Kenyon here uniformly mentions *the benefit of trade*, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather *ought to be*, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known, allowed, exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold other-

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wife, and to extend the rule in favour of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all*: and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

Posita to the plaintiff.

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Monday,
Nov. 15th.

• The KING against CLAYTON.

Every reasonable intention will be made in favour of an order of justices. Therefore where an order of bastardy reciting that it had appeared to the justices on the oath of R. T. that the said Mary Cole (refer-

TWO Justices of the Peace for the west riding of York, made an order of bastardy, entitled "The order of A. B. and C. D. the Justices, &c. made at, &c. concerning a female bastard child lately born in the township of B. of the body of Mary Cole, single woman, *since deceased*:" reciting that whereas it had appeared to them, the said Justices, as well upon the complaint of the churchwardens, &c. of the township of Bawtry, in the said riding, as upon oath of R. T. of B., &c. that *the said Mary Cole*, about six weeks ago then last past, was delivered of a female bastard child, in the said township of B., and that the said bastard child was then chargeable to the said township, and likely so to continue; and further, that upon the examination of

ring to the title in which she was named as *Mary Cole deceased*) was delivered of a bastard child, &c. and further that upon the examination of the said M. C. taken on oath, &c. dated, &c. in the presence of the said R. T. the said M. C. upon her oath charged the defendant with being the father, &c. adjudged that therefore upon examination of the cause and circumstances of the premises, *as well on the oath of the said M. C. before birth so taken and also upon the oath of the said R. T. that the defendant was the father, and that he should pay so much, &c.* The Court will intend, (especially after appeal confirming the order) that M. C. was dead at the time of the order made, and that her examination on oath before taken in writing under the stat. 6 G. 2. c. 31. was verified on the oath of R. T. before the magistrates making the order, which examination is sufficient after the death of the mother to warrant a subsequent order of filiation.

the

the said *Mary Cole*, taken upon oath before (*A. B.* another Justice of Peace), dated the 11th of May last past, in the presence of the said *R. T.* the said *Mary Cole*, upon her oath, charged *G. C.* of, &c. (the defendant) with having begotten her with the child of which she was then pregnant; they therefore, upon the examination of the cause and circumstances of the premises, as well upon the oath of the said *Mary Cole*, before birth, so taken as aforesaid, and also upon the oath of the said *R. T.*, did thereby adjudge the said defendant to be the reputed father of the said bastard child: and ordered him to pay certain sums as such towards the relief of the township, &c. given under their hands and seals, &c. (dated the 14th of October 1801.) The original order was confirmed, on appeal, by the quarter sessions: and both orders being removed into this Court by certiorari, a rule was granted in the last term to shew cause why they should not be quashed for insufficiency; 1. because it is not shewn that the defendant was summoned to appear before the magistrates to answer the complaint, nor (which might have cured the want of summons), that he had in fact appeared (*a*). 2. Because the original order was made upon illegal evidence.

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Vaughan Serjt. now shewed cause. As to the first objection: the rule is, that every thing is to be intended in favour of an order, though not in favour of a conviction: and therefore the Court will intend that the defendant was summoned, as nothing appears to the contrary: as in *R. v. Clegg* (*b*), on an order of bastardy; *R. v. Austin* (*c*), on an order for suppressing an alehouse; and *R. v. Venables* (*d*), on an order of commitment for continuing to sell ale after such an order of suppression: and the rule is laid down generally by *Buller J.* in *R. v. The Undertakers of the Air and Calder Navigation* (*e*), and by *Lord Kenyon*, in *R. v. The Guardians, &c. of Chichester* (*f*). So an order of removal need not state an examination or summons of the pauper. *R. v. Bagworth* (*g*). At any rate the second order must be good, which is stated to be made on hearing the appeal of the party, which shews that he must have been present. As to the second objection; the woman in fact died in labour before the order of filiation was made out, but after her examination on oath. Then

(a) Vide *R. v. Stone*, ante, 1 vol. 639.

(b) 1 *Str.* 475. 8 *Mod.* 4. S. C. (c) 8 *Mod.* 309.

(d) 1 *Str.* 630. 1 *Ld. Ray.* 1405. and *Salk.* 181.

(f) 2 *Term Rep.* 666. (f) 3 *Term Rep.* 496. (g) *Cal.* 179:

if

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if she were dead at the time, which must be intended, as the contrary does * not appear, *R. v. Ravenstone* (a) is in point to shew that the order might be made upon such examination taken under the stat. 6 G. 2. c. 31. Then in the subsequent part of the order, which is stated to be made "upon the examination of the *cause and circumstances of the premises*," and "*as well on the oath of the said M. C. before birth, so taken as aforesaid, and also upon the oath of the said R. T.*," the words, "*as well on the oath of the said M. C.*," &c. may be rejected as surplusage; and the order will properly stand on the rest of the evidence, by which the examination referred to in the preceding part will appear to be *in writing*, by the date assigned to it, and the rest of the evidence will appear to have been taken on oath *vivâ voce* at the time.

Erskine and *Gibbs*, contra. 1. All the precedents for such orders in *Burn's Justice* and other books, state the summons and appearance; and the cases which seem to consider such orders as good without either cannot be supported on principle. An order of bastardy is, to all intents and purposes, the same as a conviction; it fastens on the party an offence and a burthen some charge. If such an order can be supported merely upon the examination of *causes and circumstances*, without stating them; at least it should appear that the *causes and circumstances* on both sides were heard. But 2dly, Here the magistrates have gone on to state upon what evidence they did proceed, which was not sufficient: viz. "Upon the oath of *M. C.* before birth so taken;" "as also upon the oath of the said *R. T.*" As to the latter, the only evidence which could be given by him was, as to the woman's delivery, and the charge on the township. The material fact of filiation could only appear by the woman's testimony, if living; or, according to *R. v. Ravenstone*, by her examination in writing, taken under the statute, if dead. Now it no where appears that she was dead at the time of the examination on which the order was made; nor if dead, that her examination had been so taken in writing, unless by inference from what is stated as to its being *dated*, &c.; nor, if written, that it was proved or read over before the magistrates when the order was made. All that appears is, that the order was made upon a prior examination of the woman, who, for aught appears, was living at the time: and

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(a) 5 Term Rep. 373.

it rather seems, if any evidence at all were given of it at the time, it was by the parol testimony of *R. T.*

Lord ELLENBOROUGH Ch. J. The law has been settled by so strong a series of decisions from the time of Lord Holt down to a very recent period that every intendment shall be made in favour of an order of Justices, that we must see whether, by any intendment which can be made, the present order can be supported. Now it is not a very forced intendment, that the examination of *Mary Cole*, which is described as *bearing date the 11th of May, &c. was in writing*; for it must be something on which a date could be impressed. Then it must also have been produced to those who so describe it. Nor does it necessarily appear that only the fact of the examination of *M. C.* was testified by *R. T.* the witness examined; for the order goes on, "And *further*," &c. by which must be understood that it *further appeared* to the Justices, that upon the examination of the said *M. C.* taken on oath, &c. in the presence of *R. T.* she charged the defendant with being the father, &c. Then it is not a strained inference to make, that the original examination from whence this appeared to the Justices, was produced and verified upon the oath of *R. T.* Besides, this is a case after appeal to the sessions, where it must be taken that these objections, if founded in fact, would have been proved and admitted, and that if either not made, or made and over-ruled, they were without foundation in fact. Then if the woman were dead, the proceeding on her examination afterwards is fully warranted by the case of *R. v. Ravenshoe*. As to the other point, of the want of summons, the form of the order would have been better if it had followed the precedents; but the cases cited sanction the omission.

The other Judges declared themselves of the same opinion; and *Lawrence J.* added, that as to the objection, that it did not appear that the woman was dead, the contrary must be intended; for the title of the order described *Mary Cole* as being *deceased*, and she was mentioned in the body of it as the *said M. C.* which refers to the woman said in the title of it to be dead.

Both orders confirmed.

1802.

The King
against
CLAYTON.

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1802.

Tuesday,
Nov. 16th.

GOVETT *against* RADNIDGE, PULMAN, and GIMBLETT.

In an action against three, wherein the plaintiff declared that *they* had the loading of a hoghead of the plaintiff's for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the defendants so negligently conducted themselves in the loading, &c. that the hoghead was damaged; held that the gift of the action was the *tort*, and not the *contract* out of which it arose; and therefore that on plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty.

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THE declaration stated that on, &c. at, &c. the defendants had the loading of a certain hoghead of the plaintiff, then and there containing 1000lb. of treacle of 100l. value, in and upon a certain cart, for a certain reasonable reward, to be there- [63] fore paid by the plaintiff to the defendants *Pulman* and *Gimblett*, and for a certain other reasonable reward to be therefore paid by the plaintiff to the defendant *Radnidge*; yet the defendants then and there so carelessly, negligently, unskilfully, and improvidently behaved and conducted themselves in the loading of the said hoghead, &c. that by reason thereof the said hoghead was then and there, in such loading thereof, let fall, broke, and damaged, and the said treacle damaged and lost to the plaintiff. To this the defendants pleaded not guilty; and at the trial a verdict was found for the plaintiff against *Radnidge* with damages, and for the other two defendants.

This matter first came before the court in *Easter* term last, upon a motion for a new trial, against which cause was shewn in *Trinity* term following; but the Court then intimating that the objection, if any, appeared upon the record, it was agreed that it should be discussed upon a motion in arrest of judgment; and a rule nisi was made accordingly, grounded upon an alleged incongruity in the record; the declaration, as it was contended, setting out a *joint* contract, for the breach of which all the defendants were answerable either *jointly* or not at all; and the jury, by their verdict of acquittal of two of them, having negatived the joint contract as laid, and consequently that no judgment could be given against the other defendant. On a former day in this term,

Leas Serjt. and *Burrough* shewed cause against the rule. The objection supposes that the declaration is laid in *assumpsit*, in which case the contract is the gift of the action, and must be found as laid; and therefore if it be laid as a *joint* contract against several, there can be no recovery against one only as upon a *several* contract. But here the declaration is laid in *tort*, where the contract is shewn merely by way of inducement, and need not have been stated at all; and the gift of the action is the *misfeasance*, which in its nature is several, as the conversion in trover; and therefore there is no repugnancy in the finding one guilty.

guilty, and acquitting the others (a). It would have been sufficient barely to have stated that the defendants became possessed, without shewing how, of the plaintiff's hogthead, and that they did the injury complained of: and then it cannot be denied that the finding would have been good. But that which is only laid by way of inducement need not be strictly proved. It is sufficient if so much be proved as will sustain the action, and all that was necessary here to prove was, that the defendants were in possession of the plaintiff's hogthead, and that the injury was done. That such a count is in *tort*, and not in *assumpsit*, is clear from the case of *Dickon v. Clifton* (b), where a like count was joined with one in *trover*, and held well, being *ex delicto*, and not *ex contractu*, though arising out of a contract. So in *Coggs v. Bernard* (c), which was a declaration in *tort* against a carrier, alleging that he *undertook* (without saying for hire or reward) safely to take up certain hogheads of brandy out of a cellar, and deposit them in another place; but that he so *negligently* and *imprudently* put them down that one of them was staved: and upon plea of not guilty, and verdict for the plaintiff, the declaration was holden sufficient upon a motion in arrest of judgment; because the gist of the complaint being a *misfeasance* and not merely an *omission*, it was not necessary to lay any consideration for the promise. Gould J. said the declaration would be good either way; that is, whether it were laid on the contract or in *tort*. The only case which seems to bear the other way is *Buddle v. Wilson* (d); where to a similar action against a carrier on the custom of the realm, he pleaded in abatement a joint undertaking with others not sued: to which there was a demurrer. The plea in abatement, being after an imparlance, was holden to come too late; but the Court intimated an opinion that if it had been pleaded in time it would have been good; considering the gist of the action as being founded in contract, according to what was said by Denison J. in *Dale v. Hall* (e). But in this latter case the declaration was founded in *assumpsit*, to which there was a plea of non *assumpsit*. At any rate it was no more than an obiter opinion, in direct contradiction to the opinion of the Court in *Mitchell v. Tarbut* (f); where in an action against

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against
RADNIDEX.

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(a) Bro. Abr. Responder, 63.

(b) 2 Wilf. 319.

(c) 2 Ld. Ray. 909.

(d) 6 Term Rep. 369.

(e) 1 Wilf. 282.

(f) 5 Term Rep. 649.

1802.
 —
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 against
 RADNIDGE.

several possessed of a certain ship, for having by the negligent management of their servant run down the plaintiff's ship, it was ruled that the defendants could not plead in abatement that other joint owners of the defendants' ship were not named. The distinction was there taken between actions arising *ex contractu* and *ex delicto*. Lord *Kenny*, it is true, relied on *Boson v. Sandford* (a), as being founded on a breach of contract, because of the *super se suscepunt*; in which case it had been holden that all the carrier's partners should have been joined. But that has been clearly over-ruled: for even in assumpsit advantage can only be taken of the omission to sue all the partners by pleading in abatement (b); and the other point as to the form of the declaration, may be considered as over-ruled by the subsequent cases already referred to.

[66] *Dallas and Dampier*, in support of the rule. The cause of action arises partly in contract and partly in tort; the joint contract is the foundation out of which the duty arises, with the breach of which they are charged. It was therefore incumbent on the plaintiff to prove such joint contract; and that being negated by the verdict in favour of two, there can be no judgment on the verdict against the third. It is not disputed but that the contract laid (by way of inducement, as it is contended), is joint, namely, the undertaking to load by the three defendants, though a separate reward was to be paid to one of them: then whether it were necessary to have so declared or not, at any rate it shews that the plaintiff meant to rely upon the contract, and not upon the tort. If the contract were joint, the negligence of one was the negligence of all; and therefore the only ground of the acquittal of the two must have been the negating the joint contract. In *Boson v. Sandford* (c) the declaration was in this form; and though the defendants had pleaded not guilty, yet the Court gave judgment for them on the ground that the action did not arise *ex delicto*, but *quasi ex contractu*, and therefore that all the partners should have been sued. That there was no other tort but a breach of trust. That could not have been laid in assumpsit; for otherwise Lord *Holt* could not have called it an action *quasi ex contractu*, but he would have given it its appropriate name. And the practice of declaring at all in assumpsit in

(a) *Skin.* 278. *Salk.* 440. 3 *Lev.* 258. *Carib.* 58.

(b) *Rice v. Shute*, 5 *Burr.* 2611.

(c) *Salk.* 440.

such cases is of late introduction. That case is strongly supported by the opinion of the Court expressed in *Buddle v. Wilson* (a); for there could be no necessity to join all in the action if the verdict might afterwards be against one only. There too the declaration was in the same form as here. The case of *Mitchell v. Tarbut* (b) was purely a tort in running down a ship; no contract of any sort was stated as the foundation of the action. And the case of *Dickon v. Clifton* (c) so far differs from this, that there no joint contract laid as the foundation of the duty was negatived by the jury, as in this case, which is the foundation of the present objection.

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against
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Curia adv. vult.

LORD ELLENBOROUGH Ch. J. now delivered the opinion of the Court. This was an action brought by *E. Govett* against *W. Pulman, M. Gimble, and J. Radnidge*, in which he declared in the first count, upon which alone he obtained a verdict, that the defendants had the loading of a certain hogshhead of treacle upon a certain cart for a reasonable reward, to be therefore paid by the plaintiff to the two first defendants, and a certain other reasonable reward to the last named defendant. And that the three defendants so carelessly, negligently, and unskilfully behaved and conducted themselves in the loading such hogshhead of treacle, that by reason thereof the hogshhead was flayed and the treacle lost. To this declaration the defendants pleaded *not guilty*, and a verdict was found for the two first named defendants, and against the last defendant.

A motion in arrest of judgment has been made on this ground; that the cause of action stated in the first count, and upon which the question arises, is founded *in contract*, or arises at least *quasi ex contractu*, as it is said; and that being so, the finding of not guilty as to two of the defendants negatives the existence of such a joint contract by all the three defendants, as must be proved if the declaration be founded on contract: and therefore that the plaintiff is not entitled to have any judgment given for him upon this record.

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That this is to be considered as an action founded on contract has been mainly contended, on the part of the defendant, on the authority of the case of *Boson v. Sandford*; which is reported in 1 & 2 Show. 2 Lrv. 3 Mod. Salk. 440, and in other places.

(a) 6 Term Rep. 373.
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(b) 5 Term Rep. 649.
E

(c) 2 Wils. 319.
That

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That was the case of certain ship owners who were charged by the declaration to have received certain goods on board their ship, to be "safely transported for the plaintiff from London to Topp-ham, for reasonable freight and salary by the plaintiff to the defendants for such carriage thereof to be paid;" and who had undertaken (for so it is expressly laid) to transport and carry them accordingly; (I take the statement of the declaration from 2 Show. 478, where it is to be found at length;) and against whom it was charged that they, disregarding their duty, and fraudulently intending to injure the plaintiff, so negligently placed, carried, and kept the goods in the ship, that the goods were damaged by sea water. Upon *not guilty* pleaded, one question was, Whether the action were maintainable against these defendants alone, certain other part owners of the ship not having been joined as defendants. Another question was, Whether if the action ought to have been brought against all, this matter ought not to have been pleaded in abatement, and not given in evidence (as it had been) on the general issue. *Dolben* Justice (according to the report in 3 *Mod.*) was the only one of the Judges who was of opinion that this matter *could be pleaded* in abatement: about the right to do which I presume at this time of day, nobody can entertain a doubt. Nay since the case of *Rice and Shute*, before Lord *Mansfield*, in 5 *Burr.* 2611. and *Abbott and Smith*, 1 *Blac.* 947. before *De Grey* Ch. J., nobody can entertain a doubt but that the objection was available not only by *plea in abatement*, but that it was available in that way only, and cannot be taken advantage of on the general issue. Lord Ch. J. *De Grey*, in the case of *Abbot v. Smith*, speaking of the case of *Bosen v. Sandford*, says of it, "In the case of *Bosen v. Sandford* the Court were divided; and those who determined the case went upon a false assumption, *that this could not be pleaded in abatement*: had they been aware that it could, they declared that it could not have been given in evidence." This case therefore, which was so much pressed upon Lord *Kenyon*, in *Buddle v. Wilson*, and upon which he is understood to have proceeded, has been shaken to its foundation in the main points which it assumed to determine: for the action in that case was expressly an action of *assumpsit*, in which the omission to join all the part owners is a matter pleadable in abatement, and which in that mode only could be taken advantage of: both which points were however otherwise holden in the case of *Bosen v. Sandford*.

Sandford. This case may therefore be laid out of the question as an authority for some of the propositions therein determined. And as to the necessity of considering a count against carriers for hire, framed as this is upon alleged neglect of duty, and not upon the breach of any undertaking, as a count in assumpsit, and as distinguished from tort with all its consequences; [which consequences are these, viz. of letting in a plea in abatement for want of joining all the parties; of entitling the plaintiff to a general verdict if the cause of action should not be proved as against all; and of excluding the right to join therewith a count in trover;] the case of *Dickon v. Clifton*, 2 Wils. 319, which was never cited or brought before the consideration of the Court in the argument of the case of *Buddle v. Wilson*, is a case in point. There Lord C. J. *Wilmot* considered a count, in terms the same as the present, as a count laid *ex delicto* of the defendant, and that a count in trover might therefore be joined therewith. He says, "I own that in many books it is reported *that trover and a count against a common carrier cannot be joined, but common experience and practice is now to the contrary.*" And to be sure if the count against the common carrier is laid as this is, not in terms of contract, but upon the breach of duty, it is now the daily, and I think the convenient and well warranted practice, to join them.

What inconvenience is there in suffering the party to allege his *gravamen*, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner as either to join a count in trover therewith, if he have another cause of action for the consideration of the Court other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable. The only inconvenience which can be suggested is that by declaring in tort the defendant is ousted of his plea in abatement; a plea which, as it cannot be pleaded after a general

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against
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1802. imparlance is seldom of much use in point of fact; and which, as every new defendant, who may be successively * brought forward and disclosed by successive pleas in abatement, may in his turn plead that there are still other parties to the contract who ought to be and have not been joined as defendants, opens a door to endless vexation and expence, as against the plaintiff, in successive stages of unprofitable delay. The convenience, however, or inconvenience of opening a door to these pleas in abatement in all cases which may in any possible respect be considered as originating in contract express or implied, is not so much a question here, as what is the established and recognized practice in courts of law; and as that practice, certainly convenient in itself, is such also as accords with what is laid down in the case of *Dickon v. Clifton*, 2 *Wilson*, 319. and which is not directly contradicted by the judgment in *Buddle v. Wilson*; for the immediate judgment of the Court in that case went no further than to exclude the plea in abatement, upon the special ground that it was out of time, as being pleaded after a general imparlance; we are of opinion that the acquittal of one defendant, in an action founded as this is on neglect of duty, and not upon breach of promise, does not affect the right of the plaintiff to have his judgment as against the defendant, against whom the verdict has been obtained; and that the rule for arresting the judgment ought to be discharged,

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Tuesday,
Nov. 16th.

BUCKLER against BUTTIVANT and WHITE.

The defendants gave the plaintiff their own bills accepted by third persons in exchange for acceptances of other bills drawn by them on him, the different sets of which tallied in the gross amount, except a few shillings in one instance which was paid at the time, in order, as it was expressed, to finish the transaction; and except that in two instances out of five the acceptances so given by the defendants were made payable two days before the counter-acceptances of the plaintiff: but no arrears was laid at the time on these trifling differences. Held that the transaction being that of an absolute exchange of securities, each party was confined to his remedy on those securities, and that the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff the amount on the balance of his acceptances paid after such bankruptcy.

defendant,

defendant, *Buttivant*, pleaded, 1st, Non assumpsit. 2dly, That before the exhibiting the plaintiff's bill, viz. on 1st of *October* 1799, he the defendant became a bankrupt, and that the several causes of action accrued before his bankruptcy. The other defendant, *White*, suffered judgment by default. At the trial at *Guildhall*, before *Grose J.*, a verdict was found for the plaintiff for 49*l.* 15*s.* 2*d.* subject to the opinion of this Court on the following case.

The defendants were in partnership under the firm of *Buttivant* and *White*, at the time of writing the several letters, and drawing and accepting the bills of exchange hereinafter mentioned. And *White* at the same time carried on another business, under the firm of *White* and Co. distinct and separate from his copartnership with *Buttivant*. The five letters (copies of which were annexed to the case) were written by *White* to the plaintiff, and contained the five following bills of exchange: (1.) "*Norwich, July 22. 1799.—Three months after date pay to our order 61*l.* 7*s.* 6*d.* value received, as advised.*" (Signed) *T. Buttivant and W. White*," (and addressed) "*To Mr. John Henderson, Michael's Alley, Cornhill, London.*" (and which was "accepted *John Henderson*," (and indorsed by the defendants.) (2.) "*Norwich, August 31. 1799.—Two months after date pay to the order of Messrs. W. White and Co, 143*l.* 14*s.* value received as advised.*" (Signed) "*T. Buttivant and W. White*," (and addressed to and) "accepted *John Henderson*," (and indorsed) "*W. White and Co.*" (3.) This was the same as the last, only for 117*l.* 13*s.* (4.) "*Norwich, August 3. 1799.—Three months after date pay to our order 88*l.* 15*s.* value received, as advised.*" (Signed) "*T. Buttivant and W. White.*" (Addressed) "*To Mr. Wm. Wells, Princes Street, Liecester Fields, London,*" (and) "accepted *Wm. Wells*," (and indorsed by the defendants.) (5.) "*Norwich, Sept. 9. 1799.—Two months after date pay Messrs. W. White and Co. or order 153*l.* 17*s.* 8*d.* value received as advised.*" (Signed) "*T. Buttivant and W. White*," (and addressed to and) "accepted *John Henderson*," (and indorsed) "*W. White and Co.*"

The plaintiff accepted the four following bills of exchange, one dated "*Norwich, July 22. 1799.—Three months after date pay to our order 61*l.* 7*s.* 6*d.* value received as advised.*"

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against
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(Signed) "*T. Buttivant and W. White*," (and addressed to the plaintiff, and indorsed by the defendants); and the three others all drawn by "*W. White and Co.*" from *Norwich*, at two months after date, payable to their own order, and indorsed by them; the first dated "*Sept. 3. 1799*," for "*261l. 7s.*" the next "*Sept. 5. 1799*," for "*88l. 15s.*," and the last dated "*Sept. 10. 1799*," for "*154l. 3s.*" (a)

The four last-mentioned bills were accepted by the plaintiff for and on account of the defendants, *without his having received any consideration for the same, other than the before-mentioned five bills* contained in the letters hereunto annexed. On the 1st *October 1799* the defendants became bankrupts: and *Buttivant* has since obtained his certificate. At the time of suing out the commission, and before the plaintiff had proved any debt under it, the plaintiff had paid to the holders of the four bills, which he had accepted, *515l. 17s. 8d.* on account; which sum, together with the further sum of *197l. 8s. 8d.* due and owing from the defendants to the plaintiff upon another account, making in the whole the sum of *713l. 6s.* the plaintiff proved under the commission. After the suing out the commission and proof of the above sum of *713l. 6s.* under it, the plaintiff paid the balance of his acceptances of the four bills to the holders thereof, amounting to the sum of *49l. 15s. 2d.*; for which the present action is brought. The five first mentioned bills, drawn and sent by the defendants to the plaintiff, were duly presented and returned for non-payment; and the same are still wholly unpaid. But the plaintiff has received a dividend on the above sum of *713l. 6s.* so proved as aforesaid. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover the said sum

(a) The bill account stood thus between the parties :									
Bills drawn by the Defendants, and accepted by their agents, <i>J. Henderson</i> or <i>W. Wells</i> .					Bills drawn by Defendants and accepted by Plaintiff.				
Sums.			Time when due.		Sums.			Times when due.	
£.	s.	d.			£.	s.	d.		
61	7	6	25th <i>Oct.</i> 1799.		61	7	6	25th <i>Oct.</i> 1799.	
143	14	0	3d <i>Nov.</i>		261	7	0	5th <i>Nov.</i>	
117	13	0	3d <i>Nov.</i>						
88	15	0	6th <i>Nov.</i>		88	15	0	8th <i>Nov.</i>	
153	17	8	13th <i>Nov.</i>		154	3	0	13th <i>Nov.</i>	
<hr/>					<hr/>				
565	7	2			565	12	6		
			Balance						
					0			5 4	

of 49*l.* 15*s.* 2*d.*? If not, a verdict to be entered for the defendant *Buttivant*. (a)

*The letters referred to in the case, all of which were written from the defendants to the plaintiff, were as follows:

"*Norwich*, August 6. 1799. We duly received your favour, requesting a renewal of the transaction, through Mess. *Schneider* and Co. Agreeable thereto we now inclose

£.139	6	0	} <i>Schneider</i> and Co. -	<i>August</i> 6.	2 months.
159	13	0			
61	7	6			
			<i>Henderson</i> . -	<i>July</i> 22.	3 months.

£.360 6 6 to which you will procure acceptances, and credit us against the following drafts we value on you.

£.298	19	0	-	-	6th <i>July</i>	3 months.
61	7	6	-	-	22d —	3 months.

£.360 6 6 to which we request your protection; and when at maturity will finish the transaction," &c.

"*Norwich*, August 31. 1799.—Observing the drafts we remitted you on Mr. *Henderson* will be due in a few days, we have taken the liberty to inclose two more, to which we beg you will be pleased to procure acceptances, and at the same time we take the liberty to value on you the amount in one draft for the same sum, at two months from the second instant *September*, to which we shall consider ourselves much obliged by your shewing the usual protection, relying any similar service in our power is at all times at your command," &c.

"*Norwich*, Sept. 5. 1799.—We took the liberty a few posts back to inclose drafts on Mr. *Henderson*. Not hearing from you, we presume the same are duly at hand, and ends the transaction. We herewith beg to inclose a draft for 88*l.* 15*s.* on *W. Wells*, 3d *August*, 3 months. We advise said friend it lays in your hands, and have requested him to call and shew honour to the same; there being a difference off on *Saturday*, for which he has the necessary. We take the liberty to value on you the same amount,

(a) The question stated in the margin of the paper-books sent to the judges, (pursuant to the late rule of Court) as meant to be argued, was "Whether the circumstances stated in the case amounted to a mutual accommodation; so that no debt could be said to arise therefrom to either party?" This is mentioned to remind practitioners of the rule.

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at two months from this day, requesting the favour you will notice the same on its appearance," &c.

"P. S. We observe on the 12th you will have paid a draft 135*l.* 14*s.* on *T. Henderson*; pray may send answer."

"*Norwich, Sept. 9. 1799.*—We have duly your favour of the 6th instant, wherein we note your absence from home; but as we presume this will meet you, we take the liberty to remit you a draft for 153*l.* 17*s.* 8*d.* on *Mr. T. Henderson*, at 2 months, which we shall esteem it a favour you will have accepted; and as we hope it will not be attended with inconvenience to you, we take the liberty to value on you the amount in a draft the 10th instant, at two months, for 154*l.* 3*s.*; to which we beg your acceptance; and at maturity will finish the transaction, except 5*s.* 4*d.* which we beg our friend *Mr. Wells* to pay you," &c.

There was also another letter from the defendants to the plaintiff, dated "*Norwich, Sept. 19. 1799.*" the purport of which was, to inform him of their bankruptcy and distress; and hoping that the circumstance might not be attended with any fatal consequence to him, &c.

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Comyn, for the plaintiff, contended that the plaintiff was entitled to recover the balance paid by him on the bill account. This was not a debt proveable under the commission by virtue of the stat. 7 *Geo. 1. c. 31.* which puts debts due at a future day on the same footing as debts actually due and payable at the time of the bankruptcy; for unless the debt exist at that time, it cannot be so proved; and here no debt existed till after the payment of the acceptances. *Snaith v. Gale (a).* [Lord *Ellenborough* observed, that there was no change of securities in that case; and the only question here was, Whether there were such an exchange; the one giving his own acceptances, the others the acceptances of their agents; it being understood that each were to be liable for their own.] This was not an exchange of acceptances, there was no mutuality of debtor and creditor; it was a transaction of mere agency on the part of the plaintiff for the defendants in getting the acceptances of *Henderson* and *Wells*, which they desired in their letter that he would procure. [*Lawrence J.* Is it not the same thing as if the bills had been sent by the defendants to the plaintiff with the names of *Henderson* and

(a) 7 *Term Rep.* 364. and vide *Chilton v. Whiffin*, 3 *Wils.* 13. and *Young v. Hockley*, *ib.* 346.

Wells as acceptors upon them? In substance the defendants transmitted bills to the plaintiff accepted by their correspondents in exchange for the plaintiff's acceptances.] This then was not a case of mutual accommodation. [Lord *Ellenborough*. How is this case distinguishable in effect from *Rolfe v. Caslon* (a)?] That was a case of mutual accommodation: for there the parties drew cross bills on each other for the same sums, and payable at the same time, which each mutually accepted. Here the bills were not all made payable at the same time, nor for the same sums. In some instances the defendants' counter bills were made payable two days before the plaintiff's acceptances became due, which shews that they were meant to indemnify and put him in cash for the payment of his own acceptances. [Lord *Ellenborough*. That may be one circumstance from whence it is to be collected whether this were a case of mutual accommodation or not: but if you look at the letters it will put the question out of all doubt that this was a case of mutual accommodation. They speak of *finishing the transaction*.] That only meant that the transaction would be finished when the bills were paid, but not before.

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W. Jackson contra. This is either a case of mere indemnity, of principal and surety, or a case of mutual accommodation. 1. Though this were a case of principal and surety, yet the verdict for the plaintiff could not be supported. For if a surety take a counter security, he has carved out his own remedy, and cannot have recourse to another till that fail, according to *Toussaint v. Martinant* (b) as commented upon in *Cowley v. Dunlop* (c). Now here the plaintiff might have sued the acceptors on the bills, and till they failed he could not have recourse to his remedy against the drawers; and then only for so much as was not recovered from the estate of the acceptors. Besides which he has already proved his debt under the defendants' commission and received a dividend: and they cannot be liable both in their estate and persons for the same debt. But 2dly, This is not a case of principal and surety, but of mutual accommodation and exchange of securities. This appears plainly from a view of the facts stated, from the coincidence between the dates and sums of the counter bills, from the tenor of the letters, and from the express finding of the case, that the bills were accepted by the plaintiff *without his having received any consideration for the same other than the before-men-*

(a) 2 H. Blac. 570. (b) 2 Term Rep. 105. (c) 7 Term Rep. 568.

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tioned bills, i. e. the counter bill accepted by *Henderson* and *Wells*. The case of *Snaith v. Gale* (a) does not touch this; for there was no exchange of securities, but that of *Rolfe v. Caslon* (b) is in point as to the principle. The present case is simply this; the defendants transmit to the plaintiff bills drawn by themselves on third persons, payable to their own order and indorsed by them, which are afterwards accepted by such third persons; and the plaintiff in exchange accepts bills to an equal amount (except a fraction which is accounted for at the time) drawn on him by the defendants, and payable at the same time or nearly so. There is no other consideration moving to either party than the counter bills; and that constitutes it a case of mutual accommodation.

Comyn in reply distinguished this from the other cases, because there was no mutuality in the securities. For when acceptances are taken, the acceptor becomes the debtor in the first instance of the holder, and not the drawer until payment has been refused. Therefore no debt arose against the latter until the payment by the plaintiff of his own acceptances after the defendants' bankruptcy, against which payment they were bound to indemnify him. Here there was no debitum in presenti before the defendants' bankruptcy, as from the plaintiff to them, but only as to *Henderson* and *Wells*: though it does not follow, according to *Brooks v. Rogers* (c) and *Howis v. Wiggins* (d), that a bill issued before the bankruptcy of the drawer could be proved under his commission, though payable at a future day certain, where there was no debitum in presenti as between the drawer and the holder who paid money on it after the bankruptcy. That in *Rolfe v. Caslon*, and *Cowley v. Dunlop* (e), it was expressly found that the parties had agreed to accommodate each other and pay their own acceptances, which was not found in this case.

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Lord ELLENBOROUGH Ch. J. This is an action brought to recover 49*l.* 15*s.* 2*d.* which has been paid by the plaintiff since the bankruptcy of the defendants in discharge of his own acceptances. The question principally is, in what relation these parties stood to each other, whether in that of principal and agent, of which I see no evidence; or whether the transaction between them was not a downright exchange of paper for the mutual ac-

(a) 7 Term Rep. 364.

(b) 2 H. Blac. 570.

(c) 1 H. Blac. 640.

(d) 4 Term Rep. 714.

(e) 7 Term Rep. 566,

commodation

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commodation of the parties, an exchange of acceptances of the plaintiff for acceptances of the defendants, given in the name of their agents, of equivalent, or what was considered as equivalent amount; the difference being only a small sum of 5s. 4d. which was considered as the immediate debt of the defendants against whom that excess was, and which they provided for at the time. And this appears to be the true state of the case. If then an express agreement between these parties to that effect is to be collected, that excludes all implied considerations. There was no promise of indemnity on either side, in case their respective acceptances were not provided for: but each party was to look to the liquidation of his claim on the other to the bills which he took in lieu of his own, and his remedy thereon, and to those only: then the law will not raise any implied promise *ultra* those bills. The circumstances of the case shew plainly that it was an exchange of securities. In the first letter the defendants, in answer as it appears to a prior letter from the plaintiff, requesting a renewal of the transaction through *Schneider* and Co., inclose their bills drawn on S. and Co. and on *Henderson* for 360l. 6s. 6d. on the whole, which they desire the plaintiff to get accepted, and credit them for the amount *against* other drafts on him *for the same amount*, which they observe will *finish the transaction*. In another letter they write of other drafts which *end the transaction*. In another they mention a similar exchange, which “*at maturity will finish the transaction, except 5s. 4d. which we beg our friend Mr. Wells to pay you;*” throughout, the defendants when they inclose bills to the plaintiff speak of *valuing on him to the same amount*. Nothing can shew more strongly that this was a case of bills against bills for the same amount on the whole, though varying as to particular sums. The defendants say, we will give you bills accepted by certain persons in exchange for your acceptances. The plaintiff assents to that exchange. Then there is nothing else to look to on either side. The correspondence, which is the basis of the agreement between the parties, points to nothing else than an exchange of paper, which excludes all other consideration. The holder of the bills has his remedy first against the acceptor, and if he fail to pay, then against the drawer. So if the acceptor refuse payment, the drawer has his remedy on the bill against him. But the plaintiff as acceptor has no remedy against the drawers for the payment of his own acceptances, because he did not accept in consideration of a promise

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mise of indemnity, but in consideration of an agreement, or rather of an actual and executed delivery of other acceptances to the same amount. Such is the situation of these parties; and it is only on the ground of an implied consideration of indemnity, which is negated by the facts, that this claim can be sustained. Therefore the case falls within the same principle as governed that of *Rolfe v. Caslon*. The only difference is the trifling circumstance of some of the bills becoming due two days before the counter-acceptances of the plaintiff, a circumstance not regarded by the parties at the time. It is unnecessary to say any thing of the cases of *Brooks v. Rogers* (a), and *Howis v. Wiggins* (b), though I have a decided opinion upon the subject: it is sufficient for the present to observe, that the noble Lord by whom the former of those cases was determined, afterwards changed his opinion in the case *Ex parte Seddon* (c), and that the latter case has since been doubted in this court by some of the Judges in *Cowley v. Dunlop*.

GROSE J. The only question is, Whether this were a case of exchange of securities? and it plainly appears to have been so intended by looking at the letters from the defendants to the plaintiff; mention being made in them of *finishing the transaction*, that is, balancing the amount of the counter bills to be accepted by the plaintiff in lieu of those from time to time sent to him; and this too done with such exactness as to direct the immediate payment of so small a sum as 5s. 4d. overdrawn on one side in one of the bill transactions which passed between them. Then if this were the case of an exchange of securities, and not that of principal and agent, it is settled that no action can be sustained as upon an implied promise of indemnity. It was suggested to be like the case of *Howis v. Wiggins*; upon which, if it were so, there would be much to be said; but it is not necessary to enter into that consideration here, for it is enough to say that it is not the same case.

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LAWRENCE J. This is a case of mutual exchange of paper securities, and not that of principal and agent; and therefore not a case on which any implied promise can be raised: and if not, then I think, for the reasons given by me in *Cowley v. Dunlop*, the plaintiff cannot recover. I abstain from repeating the same

(a) 1 H. Blac. 640.

(b) 4 Term Rep. 714.

(c) In Chancery, 26th Nov. 1796, cor. Lord Loughborough C. cited in *Cowley v. Dunlop*, 7 Term Rep. 570.

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arguments again, because all that has occurred to me upon the subject will be found in the report of that case. Then the only remedy which the plaintiff has is upon the bills which he took in exchange for his own acceptances. But it is argued that the sum for which this action is brought could not have been proved under *Buttivant's* commission. I do not say whether it could or not; nor is it material now to decide that question; because the plaintiff's remedy is on the bills, and he must pursue that alone from whatever fund the payment is to come. It is enough to say that this action, which is founded on an implied promise and not on the bills, cannot be supported. In *Cowley v. Dunlop* the Court differed in opinion; Lord *Kenyon* and Mr. Justice *Asheurst* holding that the plaintiff was entitled to recover, against my Brother *Grose* and myself. With great deference to the opinion of those from whom we dissented, I will only observe, that Lord *Kenyon* mistook our meaning in imagining us to have considered that the amount of the bills given by the *Dunlops* could have been proved by the *Peters* under *Dunlops'* commission: we did not suppose that: we only endeavoured to shew, that the *Peters*, having received a consideration for their own acceptances in the acceptances of the *Dunlops*, could not resort to an action upon an implied assumpsit against the *Dunlops*, on the ground of having paid the acceptances of the latter as well as their own (a). I mention this to guard against any mistake of what I meant to say from the way in which Lord *Kenyon* appears to have understood what I did say.

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LE BLANC J. It has been argued that this transaction was not a case of mutual accommodation, but one of principal and agent, or more properly speaking, principal and surety. And reliance has been principally had on the expression in the defendants' letters, that the plaintiff would procure the acceptances of *Henderson* and the others, as if it were to be understood that the plaintiff was desired to pledge his own credit with those persons in order to induce them to lend their acceptances. But clearly that is not the fair result looking at the whole transaction. The plaintiff was not to procure those acceptances by pledging any credit of his own, but on the sole account of the defendants; the real transaction being that those acceptances were to be ob-

(a) Vide *Ex parte Walker*, 4 Ves. Jun. 373.

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tained by the defendants of their friends in exchange for the plaintiff's own acceptances. The acceptances thus interchanged tallied in effect in their respective amount; and when it happened that there was a difference of a few shillings in one transaction, that difference was immediately ordered to be paid up. From these circumstances I conclude that it was an exchange of acceptances for acceptances; and it makes no difference whether the acceptances so exchanged by the defendants were their own, or procured by them from friends. Then the question is, Whether in point of law this amount to an implied guarantee of each other's securities? Or, Whether it be not an absolute exchange of the securities themselves, such as they were, without any collateral responsibility? If the latter, as I conceive it is, then the law will not imply a promise to indemnify each other if the securities should fail: but the remedy must be upon the security taken, according to the cases of *Toussaint v. Martinant* (a) and *Martin v. Court* (b). Supposing the plaintiff's acceptances had first become due, and he had paid it two days before the counter bills became due, would he have had an immediate remedy against the defendants as upon an implied promise to indemnify him? I conceive clearly not; but he must have waited and taken his remedy upon the counter bills, first proceeding to demand payment of the acceptors, and if they failed, then proceeding against the drawers. It is not material however now to consider what is finally to be done upon the bills; it is sufficient to shew that there is no implied promise whereon to sustain this action. And thinking as I do that this was a case of mutual accommodation, and that each was to be answerable on the bills alone which were exchanged, I am of opinion that the plaintiff cannot maintain this action on an implied promise in consequence of having paid his own acceptances.

Postea to the Defendant *Buttivant*.

(a) 2 Term Rep. 180.

(b) *Ib.* 640.

1802.

The KING *against* the Mayor, &c. of LIVERPOOL.Wednesday,
Nov. 17th.

IN an indictment against the defendants, the corporation of *Liverpool*, for the non-repair of an highway, the first count stated that there was within the township of *Liverpool* in the county of *Lancaster*, a common king's highway and public street called *Queen-street*, used, &c. for carriages, &c. of such a length and breadth, which was out of repair, &c. And that the burgesses of the town of *Liverpool* have immemorially been a body corporate, &c. "and that the said body corporate from time whereof, &c. all the common king's highways, from time to time made and laid out within the said township, and used for all the liege subjects, &c. *except* such of the said several highways as have been, are, or ought to be repaired according to the form of the several statutes in such case respectively made, of right have from time to time respectively repaired, and been used to repair, and still of right ought," &c. The second count only varied from the former in charging the defendants with being immemorially bound to repair all the highways and public streets within the same limits, *except*, &c. The third count charged them with the same liability to repair, &c. within the town and parish of *L.* The fourth count charged the defendants' liability to arise, by virtue of their tenure of an ancient port within the said limits, and the right of taking certain tolls and duties incident thereto. The fifth count charged the same *ratione tenuræ* of certain lands: as the sixth did *ratione tenuræ* of a market. All these counts contained the same exception. The [87] seventh count, after stating the highway and public street called *Queen-street*, to be out of repair as at first set forth, proceeded to state that the defendants *by virtue of a certain agreement* before the making and laying out the said highway and street, and the building of any of the houses therein since erected, made between them and the owner of the land over and on which the street was made and the houses built, thitherto had collected and received, and still were entitled to collect and receive every year from the occupiers of the said houses respectively 4d. for each house, and from such of the said occupiers as kept waggons or carts, 7s. and 6d. for every horse kept to draw, &c. upon the within their boundaries cannot be discharged from such liability by with others.

Indictment for non-repair of a highway within a certain limit, charging the corporation of *Liverpool* with a prescriptive liability to repair all common highways, &c. within such limits, "*excepting such as ought to be repaired according to the form of the several statutes in such case made*," is bad, for want of shewing that the highway in question was not within any of the exceptions. A count stating the defendants' liability to arise by virtue of an agreement with the owners of houses alongside of it is also bad: for the parish who are *primâ facie* bound to the repair of all highways *any agreement*

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against
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&c. of LI-
VERPOOL.

highways, for the reparation of the said street : and that the defendants have from time to time repaired the same, &c. and were bound by reason of the premises to repair, &c. To all which counts there were general demurrers and joinder.

J. Clark in support of the demurrers. As to the six first counts, the prescription being qualified with the exception of such highways as ought to be repaired by virtue of the several statutes in such case made, it ought either to have been shewn what streets were so excepted, or at least it should have been averred that the *Queen Street* in question did not come within the exceptions. *Plowd.* 103. 376. *T. Jones*, 125. *Jones v. Axen*, 1 *Ld. Ray.* 120. and *Spierres v. Parker*, 1 *Term Rep.* 144. which shew that where a party means to avail himself in pleading of the general words of a pardon, covenant, devise, or enacting clause of a statute, which respectively contain any exception, he must shew that the matter which he insists on does not come within the exception. Here the exception is part of the prescription itself. It does not indeed appear whether the exception include private as well as public statutes : if the former, the Court cannot take notice of them unless they be specially pleaded. If the latter, the exception is at least as large as the liability in the abstract : but even there, whether the particular street in question fall within the exception is a fact which can only be known to the Court from an averment. As to the last count, no agreement can exonerate a parish from the common law liability to repair (a).

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Scarlett contra (being called upon by the Court) admitted that he could not sustain the last count. But as to the other counts he said he meant to contend that as all statutes relating to common highways must in the nature of the thing be public statutes, the Court was bound to take notice of them without pleading them specially, and therefore they would know that *Queen Street* in question was not within any of the exceptions alluded to : and this he observed distinguished the case from several of those mentioned where the exception was of private matters, which must be shewn in pleading.

Lord ELLENBOROUGH Ch. J. That is a position which requires to be proved by further argument. But what answer can be given to the other objection, that whether or not we are bound to notice all the statutes relative to highways, yet that as the

(a) Vide 1 *Ventr.* 90.

prosecutor

prosecutor has pleaded a prescription to repair with the exception of those statutes, he ought to have averred that the street in question was not within any of the exceptions. Suppose a statute had been passed, * enacting that the corporation should not be liable to repair *Queen-street*, must not the indictment have averred that the *Queen-street* in question was not the *Queen-street* meant by that statute.

LAWRENCE J. Suppose a statute had passed to say that the corporation were not bound to repair new streets made after the first of *January* 1801, must there not have been an averment that this street was made before that time? This shews that the circumstance of a statute being public does not take away the necessity of averring that the case does in fact come within the exception created by such statute.

Per Curiam,

Judgment arrested.

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SPENCE *against* STUART Bart.

Wednesday,
Nov. 17th.

A Rule was granted calling on the plaintiff to shew cause why the bail bond given by the defendant in this cause should not be delivered up to be cancelled on filing common bail, and why the plaintiff's attorney should not pay the costs of the application. This was grounded on an affidavit, stating that a prior action had been brought in *C. B.* against the same defendant, which was referred to arbitration by rule of court, and the arbitrator was to be at liberty to examine the parties on oath. That the arbitrator did accordingly require the defendant's attendance to be examined on oath, who came up to *London* from *Scotland* for that purpose, and was examined on the 23d of *July* last at the *Salopian* coffee-house at *Charing-cross*. That the examination not being finished till 11 o'clock at night, and the defendant having intimation that bailiffs were lying in wait to arrest him as he went away, he slept at the coffee-house that night, and was arrested there early the next morning; and that though he gave them intimation of the occasion on which he had come there they refused to liberate them. In answer to this it was sworn that the plaintiff's attorney in this cause, (who it appeared was present at the reference the night before the arrest, and was also the attorney for the plaintiff in that cause,) knew nothing of the

A defendant in a cause, attending an arbitrator to be examined under a rule of court, is privileged from arrest, eundo, morando, et redeundo.

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 —
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against
 STUART.

sheriff's officers being then about the house, nor was concerned in the defendant's arrest in the first instance (a); but having been informed by his client (the present plaintiff) of the arrest on the morning of the 24th, he had in consequence sued out a writ in this cause, and had lodged a detainer against the defendant at the sheriff's office in the course of the same morning.

Hovell shewed cause, and endeavoured first to shew that the defendant was a volunteer, and might have waived giving evidence for himself before the arbitrator; and therefore was not within the privilege of witnesses or parties attending courts of justice (b); at least as it did not appear that he was using due diligence to return. And next he endeavoured to exculpate the plaintiff and his attorney from any blame, as they were not instrumental in procuring the first arrest, but only lodged a detainer against the defendant afterwards.

[9r]

Lawes in support of the rule relied on *Hutley's case* (c), *Excheq. Trin.* 1788, cited in the last edition of *Com. Dig.* tit. *Privilege* (*from Arrest*), where it was holden that a party to a cause was privileged from arrest during his attendance on an arbitration under a rule of nisi prius; and observed that the privilege was illusory if a detainer were good, though the original arrest were founded on a breach of the privilege.

Lord ELLENBOROUGH Ch. J. This defendant was clearly privileged; and the privilege extends to one *redundo* as well as *undo et morando*. And it does not appear that he has been guilty of any negligence in not availing himself of his privilege redundo within a reasonable time; for he was arrested early the next morning, before it could be known whether he were about to return home or not.

The Court thereupon directed the rule to be made absolute: and as the plaintiff's attorney was cognizant of the occasion on which the defendant was at the place where he was arrested,

(a) It appeared that the defendant had made a similar application to the Court of C. P. out which the writ issued on which he was arrested, to be discharged from such arrest, which had been granted accordingly. After which the defendant was kept in custody upon the detainer lodged in this cause.

(b) One arrested, while attending commissioners of bankrupt to prove a debt, was holden not to be privileged. *Kinder v. Williams*, 4 Term Rep. 377.

(c) *Vide* S. C. referred to by *Lawrence J.* in *Arding v. Flower*, 8 Term Rep. 536.

they

they said they should not afford adequate protection to witnesses under such circumstances unless they made the
Rule absolute with costs.

1802.

SPENCE
against
STUART.

ATKINS and Others *against* BANWELL and Another.

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Wednesday,
Nov. 17th.

THIS was a rule calling on the defendants to shew cause why the Master should not review his taxation of the costs in the cause, and why the defendants should not refund to the plaintiffs or their attorney 18*l.*, the double costs which had been paid to them. The action was assumpsit by the parish officers of *Teddington* against the parish officers of *Milton Bryant*, to recover money laid out by the former for maintenance and medical assistance afforded to a pauper belonging to the latter parish, in which there was a judgment of nonsuit (a); and the Master had allowed the defendants double costs, conceiving them entitled to it under the stats. 7 *Jac.* 1. c. 5. and 21 *Jac.* 1. c. 12. s. 3. inasmuch as they had been sued in their character of parish officers.

Wilson shewed cause, and adverting to the rule mentioned in *Hullock* on costs, 236. to have been laid down, that the stat. 7 *Jac.* 1. does not extend to actions for a *nonseizance*, but only where some act is done by the officers; observed that the case of *Herring v. Finch* (b), cited in support of it, which was case against a mayor for refusing to receive the plaintiff's vote as a freeman, was at variance in principle with *Okeley v. Salter* (c); where the stat. 43 *Eliz.* c. 2. in pari materia, giving treble damages in case of a verdict for a defendant, &c. sued for taking a distress, &c. or any other thing doing by virtue of the act, was holden to extend to a case in assumpsit, where the plaintiff having voluntarily paid money on a poor rate, afterwards brought an action against the overseers to recover it back. [*Lawrence J.* There the act done was the receiving the money.—*Le Blanc J.* It was a payment made to avoid a distress.] The case of *Herring v. Finch* was not ultimately decided on the ground of the objection taken that the action was for a nonseizance, but because the act done by the defendant was not as a Justice of Peace,

The stat.
7 *Jac.* 1. c. 5.
& 21 *Jac.* 1.
c. 12. s. 3. giving
double
costs to parish
officers sued,
&c. extend
not to actions
against them
for a non-
seizance,
such as the
non-payment
of money laid
out for the
support of one
of their pau-
pers by an-
other parish
into which he
went; and
for which an
action of as-
sumpsit was
brought
against them.

[93]

(a) *Vide ante*, 2 vol. 565. on the principal point.

(b) 2 *Lev.* 250.

(c) *Yelv.* 176.

1802.

ATKINS
against
BANWELL.

but in his capacity of a corporator. He concluding with referring to the Master for the modern practice.

Best contrà was stopped by

The Court; who said, that this was the case of a mere non-seizance, to which the words of the statute did not extend: and there was no reason for departing in such a case from the letter of the statute.

It was thereupon referred back to the Master to review his taxation, and that such sum as he directed should be refunded.

Wednesday,
Nov. 17th.

FEISE and Another, Assignees of BROWNE a Bankrupt, against
WRAY.

A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission; held that the correspondent abroad is so far a vendor as between him and the trader here that on the bankruptcy of the latter he may stop the goods in transitu by procuring the bill of lading from the bankrupt's brother: and this though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances proveable under his commission amounting at most to part payment for the goods, which does not take away the vendor's right to stop in transitu.

IN trover the plaintiffs declared for certain bees wax, the property of the bankrupt before his bankruptcy; to which the general issue was pleaded; and at the trial before *Le Blanc J.* at the sittings at *Guildhall*, after *Hilary* term last, a verdict was found for the plaintiffs for 633*l.* 5*s.* 2*d.*, subject to the opinion of this Court on the following case:

In June 1801, *Browne*, the bankrupt, who was a trader in London, gave an order to *Fritzing*, of *Hamburg*, merchant, to procure and ship for him a quantity of bees wax. In pursuance of which *Fritzing* procured the wax in question, and shipped the same, on the account and risk of the bankrupt (packed in eight casks) on board the *Louise and Amelia*, Captain *J. Schnackenberg*, of *Hamburg*, a general ship, for the port of London, in the beginning of the month of August last, addressed to the bankrupt, and the bill of lading was filled up to the order of the bankrupt. The persons from whom *Fritzing* purchased the wax and the bankrupt were respectively strangers to and had no correspondence or account with each other. The invoice price of the wax, including the commission charged by *Fritzing*, amounted to 750*l.* sterling; for which sum *Fritzing*, at the time of shipping

the

the wax, drew three bills of exchange on the bankrupt, dated the 4th of *August* 1801, for the several sums of 210*l.*, 260*l.*, and 280*l.*, making together the said sum of 750*l.*, all payable to the order of himself at two usances; and informed the bankrupt that he had drawn the same for the price of the wax, and that the bankrupt should have credit for the same when the bills should have been negotiated:—which bills of exchange were accepted by the bankrupt, and have since been proved under his commission as after stated. The bankrupt received the invoice and bill of lading on the 10th of *August* 1801: and on the 2d of *September* last suspended his payments and committed an act of bankruptcy; and a commission of bankrupt had been issued, whereon he was duly declared a bankrupt, and the plaintiffs chosen his assignees.

On the 3d of *September* the defendant, (being the agent of *Fritzing*, under a general power of attorney, dated 7th *August* 1801), called at the bankrupt's counting-house, in order to obtain a security for the money owing by him to *Fritzing*. On this occasion the bankrupt's brother, *G. Brown*, delivered up to the defendant, as such agent, the invoice and bill of lading of the wax. The ship *Louise* and *Amelia* arrived and was entered at the custom-house in the port of *London*, on the 11th of *September*, and not before. The defendant, on the receipt of the bill of lading and invoice, delivered the former over to *Yates* and Co. for them to enter the wax at the custom-house, pay the charges thereon, and sell the same as his agents, and on his account. *Yates* and Co. accordingly received the wax on behalf of the defendant, and sold the same on his account to one *Pilgrim*, for 814*l.* 16*s.*, which sum the defendant has received in account with *Yates* and Co.; and *Fritzing* has since confirmed the defendant's act in taking possession and disposing of the wax. *Fritzing* negotiated the bills drawn by him for the wax with *F. Karstens*, a banker in *Hamburg*, to whom he indorsed the same, and received the amount from him, and gave credit for the same in his account with the bankrupt. *Karstens* negotiated the bills with other houses in *Hamburg*; and the bankrupt, previous to his bankruptcy, duly accepted the bills. The bills became due on the 7th of *October*, and were not paid by the bankrupt, nor have they been paid by *Fritzing*, who is now insolvent, but were taken up under protest by *Faise*, for the honour of *Karstens*, who has since proved the bills under the bankrupt's commission, and holds *Fritzing* and his estate also responsible for the said bills. The bankrupt, at

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the time the wax was purchased and shipped by *Fritzing*, was indebted to *Fritzing* in 3000*l.* on the general balance of account, and still continues so indebted, exclusive of the price which *Fritzing* paid for the wax, and for which he drew and received value for the before-mentioned bills of exchange. The money paid by *Yates* and Co. for the duties, freight, and charges attending the wax, amounts to 181*l.* 10*s.* 10*d.*, which being deducted from the money received from *Pilgrim* leaves 633*l.* 5*s.* 2*d.* the net value of the wax. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action: If the Court should be of opinion that they were, the verdict to stand; if not, a nonsuit to be entered.

Scarlett for the plaintiffs. No claim can arise for the defendant to detain the goods from the delivery to him of the bill of lading and invoice by the bankrupt's brother after the bankruptcy: but the goods not having reached the bankrupt, the question is, Whether *Fritzing* had a right to stop them in transitu? But, 1st, No relation existed between the bankrupt and *Fritzing*, on which the right to stop in transitu could attach; and, 2dly, If such relation did exist, the exercise of it was precluded under the particular circumstances. 1. *Fritzing* was a mere *factor*, purchasing on behalf of *Broune*, his principal; and as such, could have no right to stop in transitu, like the vendor or owner of the goods, but had only a lien on them for his balance, so long as they remained in his possession. The right of stopping in transitu does not arise out of the relation of consignor and consignee generally, but out of that of vendor and vendee only. The cases are all recent in the recollection of the Court. If indeed the factor do not disclose his principal at the time of the purchase, the vendor may proceed against him for the value; but that cannot make the factor a purchaser, as between him and his principal; for the latter, when disclosed, is responsible to the original vendor. But 2dly, Supposing this a case of vendor and vendee, no case has occurred, where the goods were even in part paid for, that the vendor could stop in transitu and retain them, unless he refunded what he had received. In *Hodgson v. Ley* (a), where the right of stopping in transitu after a part payment for the goods was established, it was found as a fact that the money so received by the vendor had been tendered back again before

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the action brought. Now here *Fritzing* has received the full value of the goods, not indeed from the bankrupt the vendee, but from others with whom he discounted the bankrupt's acceptances in respect of the goods in question, which acceptances have been since proved under the bankrupt's commission. It would be therefore unjust to withdraw from the bankrupt's estate the value of the goods while it is left liable to answer bills for the amount in the hands of third persons. In *Wiseman v. Vandeput (a)*, a court of equity first established the right of the vendor to stop in transitu, where the vendees had paid no money for the goods: but equity would never aid the vendor to assert such a right, until he had refunded what he had received, or exonerated the bankrupt's estate from all liability in consequence of bills accepted by him and afterwards negotiated by the vendor in respect of the goods. In *Kinlock v. Craig (b)*, where the circumstances were similar to the present, the whole argument turned on the distinction between vendor and vendee, and principal and factor. There the consignor's right to stop in transitu was established against the bankrupt, who had accepted bills drawn upon the credit of the goods consigned, upon the very ground of considering the relation between the parties to be that of principal and factor, and because a factor had no lien on the goods till they came into his actual possession. [*Lawrence*]. In that case it was contended that the acceptance of the bills by the consignee in respect of the cargo consigned made the transaction a sale, which it was not intended to be. There was no question as to the right of a factor to stop in transitu; for the goods had never reached the factor; but the question was, Whether the owner of the goods might not stop them in transitu before they reached the factor? And it was holden that he might, notwithstanding the factor had given his acceptances upon the credit of the consignment.] Here the argument for the defendant can only be sustained, if at all, upon the ground that the transaction was a sale: then if it be so, the acceptances must be taken to be a payment, so far as that the consignor's right to stop in transitu cannot be enforced without a tender at least of indemnity to the bankrupt's estate against its liability to such acceptances. [*Lawrence*]. Is it to be contended that if one to whom goods are consigned accept bills

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(a) 2 Vern. 203.

(b) 3 Term Rep. 119. and 783.

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drawn by the confignor for the value, and afterwards become bankrupt before the bills are paid, in consequence of which the drawer is obliged to take up and satisfy the bills; yet that the consignee is entitled to have the goods from the agent of the confignor who has stopped them? The confignor is entitled to have the *whole* value before he parts with the goods. In case of a partial payment, where the argument may cut both ways, then he who obtains the legal possession is entitled to keep it. And if the vendor have a right to stop the goods in transitu, and have stopped them, he has a lien on the goods till the whole price be paid. The assignees of the bankrupt, who are the *actors* in this case, must recover by the strength of their own title.] The goods in this case were shipped at the risk of the bankrupt, and therefore *Fritzing*, supposing him to stand in the character of a mere factor, and not of a vendor, would have lost his lien on them, and therefore could not stop them in transitu, according to *Sweet v. Pym* (a).

Marryatt, contra, said that all the cases established the right of stopping in transitu as between *confignor* and *consignee* generally; and here it was found in the case that *Fritzing* consigned the goods. But supposing there were such a distinction in law as that contended for, yet the facts did not warrant the application of it here; for *Fritzing* was to all intents and purposes the *vendor* as between these parties. He was in the common case of a merchant who purchased goods by the order of his correspondent, for which he made himself responsible, and for which he drew bills payable to his own order. [He was then stopped by the Court.]

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GROSE J. This is an action of trover by the vendee of goods who has not paid the price for them against the defendant, the agent of the vendor, who has stopped them in transitu. It appears that in *June* 1801 an order was given by *Browne*, the bankrupt, to *Fritzing*, his correspondent abroad, to purchase the wax for him. *Fritzing* bought it accordingly of another merchant, who was a complete stranger to *Browne*, and had no account or correspondence with him. There was then no privity between *Browne* and the merchant of whom the wax was purchased. On the 2d of *August* the wax was shipped, and on the 4th *Fritzing* drew bills of exchange on *Browne* for the price;

(a) *Ante*, 1 vol. 4.

and on the 10th the latter received the bill of lading and invoice. On the 2d of *September Browne* became a bankrupt; and on the next day the defendant, on behalf of *Fritzing*, obtained from the bankrupt's brother the bill of lading and invoice: and it turns out that the bankrupt's acceptances have not been paid. What is this then but the plain and common case of the consignor of goods, who has not received payment for them, stopping them in transitu before they get to the hands of the consignee. It is said that no such right exists in the case of a factor against his principal. If this were the case of factor and principal merely, I should find great difficulty in saying that it did. But here *Fritzing* may in reality be considered as the vendor. For the name of the original owner was never made known to the bankrupt. There was no privity between them; but the goods were purchased and the bills drawn in *Fritzing's* own name; and therefore he stands in the situation of vendor as to *Browne*. The defendant, acting under an authority from *Fritzing*, applied, upon the bankruptcy of *Browne*, for the purpose of getting security for the goods, and received the bill of lading from the bankrupt's brother, as he honestly might, and which the other acted honestly in giving up to him. This is agreeable to what Lord *Hardwicke* said in *Snee v. Prescott* (a), that if the consignor get the goods back again by any means short of felony, he should not blame him. Now this is the common case of consignor and consignee, where the former has not been paid for his goods, and he gets the bill of lading honestly into his possession, and stops the goods while they are in transitu. How then can we say that he is a tort-feasor, and guilty of a conversion? I am not satisfied that there is any distinction in law between the case of a vendor and a factor consigning goods; but if there be any such difference, *Fritzing* was in regard to the bankrupt the vendor in this case, particularly as the bills were drawn payable to himself.

LAWRENCE J. I am of the same opinion, that the plaintiffs have no right to recover. It has been contended that the right of stopping in transitu does not attach between these parties; that *Browne* must be considered as the principal for whom the goods were originally purchased, and that *Fritzing* was no more than his factor or agent, purchasing them on his account; and

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(a) 1 Atk. 250.

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that the right of stopping in transitu does in point of law apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country ; for I believe it happens for the most part that orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandize to them : the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with ; and they charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But at any rate this is a case between vendor and vendee : for there was no privity between the original owner of the wax and the bankrupt ; but the property may be considered as having been first purchased by *Fritzing*, and again sold to *Browne* at the first price, with the addition of his commission upon it. He then became the vendor as to *Browne*, and consequently, had a right to stop the goods in transitu. And so it is admitted that he might in the argument, considering *Fritzing* as vendor, unless he is estopped by the circumstance of *Browne* having accepted bills for the amount ; which bills, it is contended, may be proved under *Browne's* commission, and are equivalent at least to part payment of the goods : but it was decided in *Hodgson v. Loy* (a), that part payment for the goods does not conclude the right to stop in transitu ; it only diminishes the vendor's *lien pro tanto* on the goods detained. Then having lawfully possessed himself of them, he has a lien on them till the whole price be paid, which cannot therefore be satisfied by shewing a part payment only. It is possible that part payment may be obtained by proving the bills under *Browne's* commission. But if the loss must fall on one side or the other, the maxim applies, *Qui prior est tempore potior est jure*,

LE BLANC J. The questions made are, 1st, Whether the parties stood in such a relation to each other as that the right to stop in transitu attached, 2dly, Whether, if they did, there existed any circumstances in the case to repel that right ? As to the first, the situation of *Fritzing* was that of being employed by *Browne* to purchase goods abroad and to send them to him here. For the purpose then of stopping the goods in transitu,

(a) 7 Term Rep. 440.

they

they stood in the relative situation of vendor and vendee; though perhaps not so as for all purposes. *Fritzing* pledged his own credit in the purchase of the goods from the original owners; and *Browne* could not be called upon for the value by the original owners, unless the goods came to his hands, and he had not paid or accounted for the value of them to *Fritzing* with whom alone he dealt. Then clearly *Fritzing* had a right to stop them in transitu, unless the acceptance of his bills by *Browne* made any difference. But if the full price of the goods be not paid to the vendor, it does not take away his right to stop them in transitu. Now, at most in the event which has happened of *Browne's* bankruptcy, the proof of the bills under his commission can only be considered as amounting to a part payment; and it has been holden that that will not take away the vendor's right, however it may lessen his lien to the amount of the price actually advanced.

Lord ELLENBOROUGH Ch. J. then said, that having been engaged in the cause (though he did not recollect on which side) he had not taken part in the discussion: but that he entirely concurred in the opinions delivered by the other Judges. It was substantially the case of a vendor, only adding to the original price of the goods the amount of his commission. And the case of *Hodgson v. Loy* shewed that a part payment did not destroy the vendor's right of stopping in transitu; it only reduced his equitable lien pro tanto, when he got the goods into his possession.

Postea to the defendant.

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ORD against FENWICK, Executrix, &c. in Error.

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IN error, the plaintiff below declared in assumpsit in the first count as executrix of *W. F.* deceased, upon promises made to the testator in his lifetime for 600*l.* paid, laid out, and expended

A count in assumpsit to the plaintiff as executrix, for money paid

by her to the defendant's use, may be joined with another count on promises made to the testator: for, non constat but that she may have been compelled to pay the money upon an obligation by the testator as surety for the defendant to a creditor; in which case the law would raise an assumpsit in him to reimburse the testator's estate, and the money so recovered by the executrix would be assets.

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by the testator for the use of the defendant. In the second count the plaintiff declared for that whereas the defendant on, &c. at, &c. was indebted to the said plaintiff *as executrix*, as aforesaid, in other 600*l.* for divers sums of the said plaintiff *as executrix* as aforesaid, and by her the said plaintiff as executrix as aforesaid, to and for the use of the defendant, &c. paid, laid out, and expended; and being so indebted, he the defendant promised to pay to the plaintiff, *as executrix* as aforesaid, the said 600*l.* when requested, &c. Nevertheless, &c. After a general verdict and general judgment for the plaintiff below in *C. B.* a writ of error was brought in this Court; and in addition to the common errors, the now plaintiff assigned for error a misjoinder of action, inasmuch as the plaintiff below had declared in the first count upon promises made by the defendant to her testator in his lifetime; and in the second count on promises made to the plaintiff below herself, founded, as appears by that count, on a demand accruing due to her personally and in her own right, and not as executrix.

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Peake for the plaintiff in error. *Executors or administrators* cannot join in the same declaration distinct claims which they have *as such* with other claims in their individual characters (*a*), otherwise it is bad after verdict (*b*). The first count is clearly for a debt due to the testator; it is for money paid by him in his lifetime: but the second is for a debt due to the plaintiff below in her own right; for it is for money paid by herself. Then calling herself *executrix* is mere surplusage, and would not exempt her from costs. She could not pay money *as executrix* to the defendant's use; for supposing the money paid out of the assets, it would still be paid in her own right. For having once received it, she would be answerable to the creditors. [Lord *Ellenborough*. If any case can be put, where an executrix as such might pay money to the use of the defendant, the argument will not hold; for you take upon you to make out that there is no such case. Now if the executrix had been sued upon a joint bond of her testator and the defendant, on which the plaintiff obtained judgment, and then she had paid the whole debt, an action would lie by her as executrix, to recover a con-

(a) Vide *Hookin v. Quilter*, 2 *Str.* 1271. and 1 *Wils.* 171.

(b) Vide *Brigden v. Parks*, 2 *Bos. & Pull.* 425. and *Hancock v. Heywood*, 3 *Term Rep.* 433.

tribution if it were a joint debt, or the whole if the testator were only a surety (a).] If such were the case, it should have been so stated on the face of the declaration, that it might appear to be a case in which she was entitled to sue as executrix. In *Bidgood v. Way* and his wife (b) in error, where the wife was joined in an action with the husband for use and occupation against the defendant below and for money had and received, and had a verdict and judgment in C. B. ; this Court reversed the judgment, because the sole interest must be presumed to be in the husband, unless a particular interest were expressly stated in the wife : although the same argument was urged there that it would be sufficient to sustain the judgment if a possible case could be shewn where the joint promise to the husband and wife would be good ; and such cases were shewn. [Lord *Ellenborough*. The declaration is not stated sufficiently explicit to enable us to judge of the application of that case to be present. It does not appear *whose* lands had been used and occupied, whether the husband's or wife's, which must have been stated.] In *Betts, Executor, v. Mitchell* (c), there were counts on assumpsits to the testator, and also a count on a promissory note made to the plaintiff *as executor*, which the Court held could not be joined, and gave judgment for the defendant on demurrer. And yet it might have been as well urged there as here, that the security was given in consequence of an obligation to the testator. [Lord *Ellenborough*. There the security itself was created after the death of the testator, and therefore the executor, must have sued upon it in his own right, whatever the original consideration might have been.] The case shews at least that the plaintiff, stating the promise to be made to him *as executor*, does not conclude, if he ought not to have sued in that character ; but it may be rejected as surplusage. It was expressly decided in *Goldsbrow's* and wife, executrix, v. *Petrie* (d), that a plaintiff could not sue *as executrix* for money *had and received* by the defendant to her use, *after the death of the testator* ; but would nevertheless be liable to costs, if she failed. And there seems no distinction in principle between that case and assumpsit for money *paid* by the executor to the defendant's use after the death of the testator. And in *Jennings*

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(a) It was intimated from the bar that such was the real case.

(b) 2 Blac. R. 1236.

(c) 10 Mod. 316.

(d) 5 Term Rep. 234.

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v. *Newman* administratrix (a), and other cases (b), it has been holden that a count on a promise made by the defendant as administratrix to pay money received by her as such to the plaintiff's use could not be joined with other counts on promises made by the intestate. [Lawrence J. In actions against executors, the judgment would be different on the different counts charging them as such, and also in their own right; and there those cases do not apply.]

Wood, contra, insisted that it was sufficient to sustain the judgment, if there were any possible case in which the plaintiff below could sue as executrix for money paid to the use of the defendant after the death of the testator; and that the case put by the Lord Chief Justice was the fact in this instance. The testator having become surety for the defendant, and the executrix having been compelled to pay the money to the creditor, she could only recover in her character of executrix, because she must have proved the undertaking of her testator (c). If then she might have declared specially in that character, by setting forth all the facts, shewing how the defendant became liable to pay to her as such, there is no reason why she may not declare generally as executrix, and give the special matter in evidence. In *Bidgood v. Way* (d), as it was not stated to be the wife's land, the Court could not infer it: besides there was a count for money had and received to the use of the husband and wife, and an assumpsit to both. In *Betts v. Mitchell* (e), the taking a promissory note by the executor gave a new cause of action to him, on which he could only sue in his own right. But the case of *Petrie* and another, executors, v. *Hannay* (f), is in point, that a count for money had and received by the defendant to the use of the executors, as such, may be joined with a count for money had and received by him to the use of the testator. There were also counts for money paid by the executors to the use of the defendant, of which no notice was taken in what was said by the Court; and therefore it is probable that they were considered to stand on the same ground as the counts for money had and

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(a) 4 Term Rep. 347.

(b) *Rose and Wife v. Bowler and another, Executors*, 1 H. Blac. 108. and *Brigden v. Parkes*, 2 Bos. & Pull. 424. S. P.

(c) Vide *Cooks v. Lucas*, ante, 2 vol. 395.

(d) 2 Blac. R. 1236.

(e) 10 Mod. 316.

(f) 3 Term Rep. 569.

received,

received. [*Lawrence J.* That case came on upon a motion to amend from the Judge's notes, after a writ of error brought, by adding a verdict for the plaintiffs, on the second plea, which had been omitted to be entered at the trial. But what became of the writ of error afterwards does not appear.] It was dropped in consequence of the amendment. With respect to the case of *Goldsbroyte v. Petrie* (a), it was sufficient as to the question of costs, if the plaintiff might have declared in his own right. And as to *Jennings v. Newman* (b), an answer has already been given by the Court. But the rule was laid down in *Cockerell v. Kynaston* (c), that if the money or goods, when recovered, would be assets in the executor's hands, he must sue for them in his representative capacity. There it was holden that a count in trover by the executor, for a conversion in the testator's lifetime, might be joined with another count for a conversion in his own time.

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Peake, in reply, referred to 2 *Saund.* 117. d. (last edition by Mr. Serjt. *Williams*), where all the cases are collected, and some are referred to which are contrary to what is said in *Petrie v. Hannay*, and seem to explode the rule in *Cockerell v. Kynaston*.

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LORD ELLENBOROUGH, C. J. It is said that the two counts cannot be joined, because the first is for a debt due to the testator, and the second, being for money paid by the executrix herself to the defendant's use, must be taken to be for a debt due to her in her own right, although she has declared for it as due to her in her representative character. But if we can suppose a case where the money must have been paid by her as executrix, and for which she must entitle herself to recover as such, the judgment may be sustained. Now there is one such case, and one only which occurs to me, which I before mentioned, namely, where the executrix has been sued on the obligation of her testator, who had become surety for the defendant, whose debt she has been obliged to pay, to recover which the law would raise an implied promise by the defendant to her as executrix to repay the money. Then if there be one case where she could not help paying money out of the assets to the defendant's use, which he was bound to make good, surely she may sue for it, and properly call herself executrix, in which character alone she could entitle

(a) 5 *Term Rep.* 234.

(b) 4 *Term Rep.* 347.

(c) 4 *Term Rep.* 277. 281.

herself

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herself to recover it. She could not pay this money out of her own funds, and raise an implied assumpsit against the defendant; nor could she properly declare in any other character: if she could, I admit that she ought not to have named herself executrix. I will not consider what the consequence would have been had this been a count for money *had and received* to the use of the executrix after the death of the testator: there the case of *Goldbwayne v. Patrie* would properly have applied. But here I have stated a case where she must sue as executrix. The cases however are somewhat perplexed; and therefore at present we shall only be considered as giving judgment nisi, &c. for the defendant in error. And if any doubt should occur to us in the course of the term, we will intimate it; otherwise the judgment will stand.

GROSE J. declared himself of the same opinion.

LAWRENCE J. referred to the case of *King v. Thom* (a), where Buller J. said, "that the only question is, Whether the sum, when recovered, will be considered as *assets* of the testator? "if so, that is all the Court look to."

LE BLANC J. The same was said in *Cockerell v. Kynaston*: and that was a very strong case; for that was a case where the plaintiff declared in trover as executrix for a conversion after the death of the testator.

(a) 1 *Term Rep.* 489. There it was holden that where a bill of exchange was indorsed to the plaintiffs as *executors*, they might declare as such as in an action against the acceptor.

Thursday,
Nov. 18th.

FORD against LOVER.

In an affidavit to hold to bail for 16l. and upwards, it is not sufficient to negative a tender in Bank notes of the said sum of 16l. and upwards; though if the negative had been of such tender of the said sum only, that would be taken to refer to the specific sum mentioned which might be so tendered.

THE plaintiff, in the affidavit to hold to bail, deposed, that the defendant was justly and truly indebted to him in 16l. and upwards for money lent, &c.; for which said sum of 16l. and upwards, he, the plaintiff, had not been tendered any Bank of England bills or notes, &c. whereupon

Barrow obtained a rule nisi for discharging the defendant out

of custody on filing common bail, on the insufficiency of the affidavit, as non constat but that the sum due above the 16*l.* was a fractional sum, for which no tender in bank notes could be made; which would bring this within the case of *Jennings v. Mitchell* (a).

Wigley shewed cause, and relied on *Maylin v. Townshend* (b), where in an affidavit to hold to bail in 20*l.* and upwards, it was holden sufficient to negative a tender of the said sum in bank notes; as that was taken to have reference to the specific sum sworn to, which was such as might be so tendered. The only difference there was, that the words ("said sum of 20*l.*) and upwards," was not repeated, as here the words "16*l.* and upwards" are: But,

Per Curiam. That makes all the difference. Here the words negating the tender expressly refer to a sum beyond the 16*l.*

Rule absolute (c).

(a) *Ante*, 1 vol. 17.

(b) *Ante*, 2 vol. 1.

(c) The same point was before ruled in *Barnet v. Wheeler*, Hil. 41 G. 3. and in *Major v. Martin*, E. 42 G. 3.

SCOTT against SOANS.

THE defendant was sued in assumpsit for work and labour and on the common counts, by the name of "*Jonathan otherwise John Soans*." And he demurred to the declaration, and assigned for cause that "the said *John Soans* the defendant is in and by the said declaration described as having two christian names of *Jonathan* and *John*; whereas by law no person can have two christian names; and also for that it is uncertain by the declaration which is the defendant's real christian name.

Wood, in support of the demurrer, relied on *Evans v. King* (a), in which *Ld. Ch. J. Willes* notices all the principal cases; where it was holden that a declaration against *John A.*, otherwise *John James A.*, is bad, as a man cannot have two christian names.

Lord ELLENBOROUGH C. J. That came on upon a plea in

Friday,

Nov. 19th.

The defendant being sued by the name of "*Jonathan otherwise John Soans*."

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is no cause of demurrer to the declaration; for, non constat that it is not all one christian name.

(a) *Willes*, 554.

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abatement, which introduced a fact, that he was known by the one name and not by the other; each of the christian names being prefixed to what appeared to be the surname. So here, if the defendant plead in abatement, it will appear probably that he is sued by two christian names: but this comes on upon a demurrer to the declaration, assuming a fact which does not appear: for, non constat but that "*Jonathan* otherwise *John*" is all one christian name. Names as fanciful as "*otherwise*" frequently occur. We cannot intend either way: and if the fact really were so, we should be deciding against the fact if we gave judgment for the defendant upon this demurrer. Suppose a man bound himself in a bond by the name of "*Jonathan* otherwise *John Soans*," what objection could be made to it? If he had been sued by the name of "*Jonathan Soans*," otherwise "*John Soans*," it might perhaps have admitted of a different consideration. But here at any rate we are not bound to know that he is sued by more than one christian name.

Per Curiam,

Judgment for the plaintiff.

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Saturday,
Nov. 20th.

The KING against The Inhabitants of HOLLINGTON*.

One who resided on a tenement of 5*l.* a year in the parish of *W.* and at the same time rented the ley (i. e. pasture) of two cows from *May day* to *Michaelmas* in certain land in *H.* at 6 guineas, thereby gains a settlement in *W.* though he were not entitled to the exclusive pasture of the land in *H.*

TWO Justices by an order removed *William Hinckley, J.* his wife, and *S.* his daughter, from the parish of *Byssadfall* to the township of *Hollington*, both in the county of *Derby*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court, on the following case.

The pauper, *William Hinckley*, being legally settled at *Hollington*, under a hiring and service for a year, went to reside in the parish of *St. Werburgh* in *Derby*, and occupied a house there of the annual value of 5*l.* During the time the pauper occupied this house he rented the ley of two cows (*a*) from *May-day* to *Michaelmas*, at six guineas, in a large pasture containing 100 acres, and of the annual value of 250*l.*, belonging to *Mr. Mundy*, at *Markseaton*. The pauper had not the exclusive pasture of this land, and *Mr. Mundy* was under no restriction as to what num-

* I was not present in court when this case was determined; but was favoured with this note by *Mr. Nolan*.

(a) The cows were the pauper's own.

ber of cows he kept in it. The sessions were of opinion that this ley of the cows was not a tenement, and therefore that the pauper did not acquire a settlement in the parish of St. *Werburgh*.

Balgu, in support of the order of sessions, observed, that this was a new case, distinguishable from *Rex v. Stoke (a)*, *R. v. Piddletrentside (b)*, and *R. v. Tolpuddle (c)*, and all that class of cases, except *R. v. Lockerly (d)*, which was properly over-ruled, where the pauper had the exclusive pasturage of the land for a certain period. Such a contract is in its nature real, and may therefore be well deemed a tenement within the stat. 13 & 14 Car. 2. c. 12.: and the exclusive right to the pasturage was particularly relied on by the Court in *R. v. Tolpuddle*, where all the authorities were reviewed by them. But here there is no exclusive right; for Mr. *Mundy* might have put in as many cows as he pleased; he might have overstocked the ground so much as to render it impossible for the pauper to have maintained his cows there (e).

Clarke contra was stopped by the Court.

LORD ELLENBOROUGH Ch. J. If this had been a new question, I might have thought that the statute was intended to refer only to corporeal hereditaments; but an incorporeal hereditament has been so long ago decided to be a tenement within the meaning of it, that it is now too late to over-rule it. Lord *Knyen* repeatedly declared himself to be of that opinion, and did so in the cases cited. The present case is nothing more than a common in gross (f), which has been holden to be a tenement within the statute. As to the argument that Mr. *Mundy* is not restrained from putting in as many cows as he pleases, and that there might be a deficiency of pasture; no fraud is found; the landlord let the pasture of two cows, and if he overstocked the land the tenant might recover in damages.

GROSE J. was of the same opinion.

LAWRENCE J. In *Rex v. Piddletrentside (g)*, Mr. Justice *Buller* states, that the question in cases like the present is this, Whether or not it be a contract to receive profits out of land? If that be so, it determines this case: for here the cows were the

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against
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(a) 2 Term Rep. 451.

(b) 3 Term Rep. 772.

(c) 4 Term Rep. 671.

(d) Burr. S. C. 315. and 2 Const. 148.

(e) The annual value of the land on which the cows are depastured must be such as to make up 10l. a-year, in order to confer a settlement. *R. v. Mawworth, ante*, 2 vol. 108.

(f) Vide *R. v. Whinley*, 1 Term Rep. 137.

(g) 3 Term Rep. 775.

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pauper's own, and the contract, which was for the pasturage of them was, to use the words of Lord Kenyon in the same case, a contract for the pernamcy of the profits of the land by the mouths of the cattle.

Le Blanc J. was of the same opinion.

Both orders quashed.

Saturday,
Nov. 20th.

SPYVE against TOPHAM.

A lease for a year being made between *A.* and *B.*; the release, stating *B.* to be a trustee for *C.* granted the premises unto *C.* in his possession being by virtue of an indenture

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of lease, bearing date the day before the release, and to his heirs, *habendum* to *B.* and his heirs to such uses as *C.* should appoint; held the release sufficient to convey the premises to *B.*; and the words in the granting part "unto *C.*" &c. may be rejected as surplusage.

AT the trial of this cause at the last *Lincoln* assizes, before *Graham B.*, a verdict was found for the plaintiff, with 200*l.* damages, subject to the opinion of this Court on the following case.

This was an action for money had and received by the defendant to the use of the plaintiff; to which the defendant pleaded the general issue. By an agreement between the plaintiff and the defendant on the 22d of *March* 1801, the plaintiff contracted with the defendant for the purchase of certain premises situate in the parish of *St. Peter*, at *Arches*, in the city of *Lincoln*, for the sum of 1600*l.*, and the defendant agreed to make the plaintiff a good title. The plaintiff paid to the defendant the sum of 200*l.* part of the consideration-money for the purchase of the said premises; but afterwards objected to the title, and brought this action to recover back the 200*l.* The plaintiff's objection to the title arose upon a conveyance of the premises in question, made by one *Thomas Thickson*, the material parts of which conveyance are as follows. Indentures of lease and release, bearing date the 23d and 24th of *March* 1781, the release being of three parts, between *R. Thickson*, one of the aldermen of the city of *Lincoln*, of the first part; *J. Topham*, of the city of *Lincoln*, drug-gift, of the second part; and *G. Bafs*, of *Wintborp*, in the county of *Lincoln* aforesaid, a person named in trust for the said *James Topham*, of the third part. In consideration of 700*l.* to the said *Thickson*, paid by the said *Topham*, and of 10*s.* to the said *Thickson*, mentioned to be paid by the said *Bafs*, he the said *Thickson* did, at the request and by the direction and appointment of the said *Topham*, testified as therein mentioned, grant, bargain, sell, release, and confirm unto the said *James Topham*, in his actual possession now being, by virtue of a bargain and sale to him then made

made by the said *Thickston*, by indenture bearing date the day next before the day of the date of these presents, for one whole year commencing from the day next before the day of the date of the said indenture of bargain and sale, and to his heirs and assigns for ever, two messuages or tenements situate in the parish of *St. Peter*, at *Arches*, in the city of *Lincoln*, with the appurtenances, &c. ; to have and to hold the same unto the said *Baſi*, his heirs and assigns, to the use of such person or persons, and for such estate or estates, and in such manner as he the said *Topham*, during his life, should, by any deed, appoint ; and for want thereof, to the use of the said *Topham* and *Baſi*, and the heirs and assigns of the said *Topham* for ever ; the estate of the said *Baſi* being in trust for the said *Topham*, his heirs and assigns for ever. The lease for a year is made between the said *Thickston* of the one part, and the said *Baſi* of the other part, whereby the said *Thickston*, in consideration of 5s. to him paid by the said *Baſi*, did bargain and sell to the said *Baſi*, his executors, &c. all the said premises, &c. ; to hold the same to the said *Baſi*, his executors, administrators, and assigns, from the day next before the day of the date thereof, for the term of one year, at a pepper-corn rent ; to the intent that by virtue thereof and of the statute for transferring uses into possession, he the said *Baſi* might be in actual possession of the premises, and be thereby enabled to take a grant and release of the reversion and inheritance thereof to him and his heirs ; to and upon such uses, &c. as should be declared by the said indenture of release. The said *Robert Thickston*, before and at the time of making the said indenture of release, was possessed of an estate in fee-simple in the said premises, free from all incumbrances. The defendant is the only son and heir at law of the said *J. Topham* therein named, and has enjoyed an undisturbed possession of the said premises under the said indentures for upwards of 20 years. It was admitted that the only objection to the defendant's title is the insertion of the name of *J. Topham* as releasee, instead of *G. Baſi* in the indenture of the 24th March 1781. The question for the opinion of the Court was, Whether the defendant could make a good title to a purchaser : if he could, a verdict to be entered for the defendant ; if not, the verdict for the plaintiff to stand.

Reader, for the plaintiff, stated the only question to be, Whether the insertion of the name of *Topham*, as releasee, in the release, instead of that of *Baſi*, to whom the bargain and sale had

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been before made, rendered the defendant's title defective. He said it was impossible for him, on comparing the two deeds, to contend that this was not a mere clerical error: for they declare *Bafs* to be a trustee, and that the conveyance was made to him by *Topham's* direction. The question therefore would be, Whether the grant in the deed of release to *Topham* and his heirs could be controlled by the subsequent *habendum* which was to *Bafs* and his heirs? [Lord *Ellenborough* asked if the words "unto the said *J. Topham*," &c. in the premises, which were repugnant to the *habendum* and the rest of the deed, might not be rejected as surplusage?] It seems so in good sense, if that may be done. But the doubt has arisen upon the case of *Busford v. Coulter* (a), where it was pleaded that one by a certain indenture bargained and sold the moiety of the manor of *Ilbury* (without saying to whom), *habendum* to *W. G.* in fee: and it was objected that in the premises the bargain and sale was not to any person, and that it was not helped by the *habendum*, the office of which was to limit and not to grant an estate; and that without a grantor and grantee in the premises the deed was void; and it was ruled accordingly.

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Smyth, contra, after citing *Co. Lit. 7. a. Sheph. Touch. 75. Butler v. Elton* (b), and *Erles v. Lambert* (c), to shew that a grant is good, although the name of the grantee be omitted in the premises of the deed, provided it be mentioned in the *habendum*, was stopped by the Court.

LORD ELLENBOROUGH Ch. J. The cases cited are perfectly satisfactory in authorising us to put a construction on the deed, in support of it, which, from the reason and good sense of the thing, we should probably have done without such authorities.

Per Curiam,

Postea to the defendant.

(a) *Cro. Eliz.* 903, 4.
 (c) *All.* 41.

(b) *Gary's Rep. in Chan.* 122.

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The KING against SAUNDERS.

Monday,
Nov. 22d.

ADAM moved for an information in nature of a quo warranto against the defendant, to shew by what authority he claimed to be an alderman of *Taunton*. He stated that the defendant had been elected alderman in 1788, and the corporation was dissolved in 1792, since which no acts had been attempted to be done by the corporate body; but that the defendant, who had resided at *Bristol* for the last fourteen years, had made his appearance in *Taunton* at the last general election for members to serve in parliament, and had there claimed, as alderman, to be the returning officer, and had received votes as such, and had executed a separate return.

Lord ELLENBOROUGH C. J. This is a very foolish claim on the part of the person against whom you apply, and he may perhaps deserve to be punished for his impertinent intrusion by the Attorney General. But it is rather an object of an application *in poenam*, than for the civil interference of this Court. The corporation being stated to be actually dissolved, and no corporate body, claiming to be such, in existence, the act of this individual person was a mere nullity, of no more effect than if a mere stranger had come into the town and claimed to be an alderman and returning officer. Here are no civil rights in controversy, which would warrant the Court to interfere by their own authority; but what he claimed was a mere nullity; there was no such office in existence. There is therefore no ground for our interference.

Per Curiam,

Rule refused.

civil right in controversy, but it being rather the ground of a proceeding *in poenam* by the Attorney-General.

Where a corporation was dissolved, and no corporate body existed in fact at the time, the Court refused to grant an information in nature of *quo warranto* against an individual for an impertinent claim to be returning officer at an election of members to serve in parliament, by

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virtue of his having been elected an alderman while the corporation existed in fact; there being no

1802.

Monday,
Nov. 21d.

An action at law lies again, it an executor to recover a specific chattle bequeathed, after his assent to the bequest.

DOE on the Demise of Lord SAYE and SELE against GUY.

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IN ejectment for a certain leasehold house and premises in *Grosvenor Street*, in the parish of *St. George, Hanover Square*, in the county of *Middlesex*, it appeared that the lessor of the plaintiff claimed the premises in question under a bequest of the lease thereof from *Mrs. Mary Guy*, to whom the defendant was executor; that soon after the death of the testatrix, which was in *January 1802*, upon *Lord Saye and Sele's* application to the defendant to deliver up the possession of the house, he returned for answer by letter, that it was not convenient to him to remove before *Michaelmas* then next, at which period, but not before, he was willing to resign it. By a subsequent letter the defendant informed the lessor that he was ready to resign the house on the 25th of *April* (a). This was ruled by *Lord Ellenborough, Ch. J.* at the trial at the sittings at *Westminster*, before *Trinity* term last, to be evidence of the defendant's assent as executor to the bequest. But it being contended further, upon the authority of *Deeks et Uxor v. Strutt* (b), that no action at law would lie to recover a legacy, which was in substance the case here, a verdict passed for the plaintiff, with liberty to the defendant to move the Court to set it aside, and enter a nonsuit. A rule nisi was accordingly obtained for this purpose in the last term: against which

Gibbs and Marryat now shewed cause. The case relied on of *Deeks v. Strutt* was where an annuity was devised, payable out of the general funds of the testator, which had been paid for several years by the executor; but there was no express promise to pay the arrears for which the action was brought: and the question there was, Whether the acknowledgment of assets by the defendant were sufficient to raise an implied assumpsit in law to continue the payments as they became due. That differs from a bequest of a specific thing, to which the executor has expressly

(a) The declaration was served on the 28th of *April*, on the defendant's again refusing to deliver up possession before *Michaelmas*, and two demises were laid, one on the 23d of *February*, 44 days after the decease of the testatrix, and the other on the 26th of *April*, the day after the expiration of the defendant's undertaking to quit.

(b) 5 Term Rep. 690.

assented,

assented, in which case there are many authorities in the books to shew that such assent passes the legal title under the will. It is the common form of pleading in making title to a term under a will, to state that such an one made a lease to *A. B.*, that *A. B.* afterwards died possessed of the term, and devised the same to the party claiming, and made *C. D.* his executor, and that *C. D.* proved the will, and assented to the bequest, by virtue of which the party became entitled, &c. In *Paramour v. Yardley* (a), a lessee for years devised the term to his son, but interposed his wife, to have the rents and profits during the minority of his son, in order to educate his children, and made his wife executrix. And she, before all the debts were paid, but having other assets sufficient to pay them, assigned the term to her sister. After the wife's death, the son came of age, and entered and conveyed to the plaintiff, upon whom the defendant, claiming under the sister, entered, &c. And the first question was, whether the wife took any present interest as devisee under the will; and then, whether she agreed to the bequest; in which case her assent to the first estate to herself was an assent to the remainder to her son; or whether she shewed her disagreement afterwards by the assignment to her sister, as executrix. And *Wray* C. J. and the rest of the Court were of opinion that the occupation by the wife, and her education of the children before the assignment to the sister, testified her assent to the bequest in the form in which it was in the will, and therefore that the remainder vested in the son, and his entry was lawful. So in 4 Co. 28. b. it is said, "if a man devise a term to *J. S.*, and the executors agree and assent that *J. S.* and *J. N.* shall have the term, or that *J. S.* shall have it upon condition; in these cases *J. S.* shall have the term *solely and absolutely*; for after the assent of the executors he is in by the devise." And in *Young v. Holmes* (b) the plaintiff, who was devisee in remainder of a term after the death of the testator's executor, recovered in ejectment upon proof of the executor's assent to take as devisee and not as executor against the executrix of the latter.

Warren, contra, relied on the ground of the decision in *Deeks v. Strutt*, which applied as well to the case of a specific legacy as of a legacy payable out of the general fund; namely, that no action at law lay to recover it against the executor because a

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against
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(a) *Plowd.* 539.(b) 1 *Sira.* 70.

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court of law could not in many instances do that justice to the parties concerned as a court of equity were accustomed to do: for the latter would in the case of a legacy to a married woman oblige the husband to make a suitable provision for her if she were not before sufficiently secured. Whereas this Court could not impose terms on one who was entitled to recover upon his legal title. The opinion of the Judges in that case was delivered generally against supporting an action at law for a legacy, without the distinction now set up. The cases of *Atkins v. Hill* (a), and *Hawkes v. Saunders* (b), were indeed cases of express promises; but the reasoning there went the whole length of this case, if it had been well founded: but it was controverted and considered to be overruled in *Ducks v. Strutt*.

Lord ELLENBOROUGH Ch. J. General language used by the Court in giving their opinions in any case must always be understood with reference to the subject matter then before them. The question of a specific legacy assented to by the executor was not before the Court in *Ducks v. Strutt*, but whether the law would raise an implied promise on proof of an acknowledgment of assets by the executor, so as to sustain an action against him for an annuity, payable out of the general funds of the testator. But it never could be doubted but that at law the interest in any specific thing bequeathed vests in the legatee upon the assent of the executor. If it should afterwards appear that there is a deficiency of assets to pay creditors, the Court of Chancery will interfere and make the legatee refund in the proportion required. It makes no difference whether the bequest be of a personal or real chattel: but according to the doctrine laid down in the cases cited of *Paramour v. Yardly*, and *Young v. Holmes*, and the passage from 4 *Rep.* 28. the assent of the executor once given to a specific legacy, vests the interest at law irrevocably; and this is not broken in upon by any subsequent case. Now here was ample evidence of an express assent by the executor; for he appointed a certain day for giving up the possession of the house to the lessor of the plaintiff; and therefore the latter is entitled to recover.

GROSE J. The only question in the case of *Ducks v. Strutt*, was, Whether the law would raise an implied assumpsit to pay the annuity, upon proof of the executor's acknowledgment of

(a) *Gowd.* 284.(b) *Ib.* 289.

assets. I thought it would not: but this is the case of a specific legacy, in which all the authorities shew, that upon the assent of the executor, the interest vests at law in the legatee.

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LAWRENCE J. What was said by the Court in *Deaks v. Strutt* (a) must be taken with relation to the case then before them, which was an action for a legacy not founded upon any express assent of the executor, but endeavoured to be supported upon an implied assent in law, on account of a sufficiency of assets, which implication the Court held that they could not raise. All the Court treated it as a new attempt; and therefore they could not have intended to apply the same doctrine to a case like the present, where there was an assent by the executor to the specific legacy; for there are many authorities in the books in support of such an action; as in *Duppa v. Mayo* (b), where in an action against the representative of an executor for the arrears of an annuity bequeathed by the testator out of a term of years, a general consent of the executor to the legacy is alleged in the declaration; on which there was judgment for the plaintiff. So in *Saunders's case* (c), it is said, "If lessee for years devise his term to another, and make executors, and die; and the executors do waste, and afterwards assent to the devise; in that case, although between the executors and the devisee, it hath relation, and the devisee is in by the deviser; yet an action of waste shall be maintainable against the executors in the *tenuit*. There, however, Lord Coke clearly considers that the assent of the executor vests the term in the legatee from the death of the testator. The same question came on in another case of *Chamberlain v. Chamberlain* (d): Thomas Chamberlain made his wife executrix, and bequeathed a lease to her for life, remainder to his son for life, remainder to his first son and his heirs male. The wife assented, and died, having made Croft her executor. There being a deficiency of assets, the question was, If Croft could sell the lease? And the Lord Keeper Finch declared the lease should be assets, notwithstanding the assent. But that if after such assent, J. Chamberlain the son had sold the lease to a third person bona fide, this had defeated the creditors; for this had been a good title at law; and the purchaser should not be defeated by this trust for creditors. Therefore the Lord Keeper in terms said that the effect of the assent of the executrix was to vest the term in the

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(a) 5 Term Rep. 690.

(b) 1 Saund. 278.

(c) 5 Rep. 12. b.

(d) 1 Chan. Cas. 256.

legatee;

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legatee; though he would be considered as a trustee for the creditors in the event of a deficiency of other assets. Also in *Bastard v. Stukely* (a), one devised goods to A. & B.; the executor assented to the legacy, and afterwards A. died: and now the executor of A. sued in the spiritual court for A.'s share, there being no survivorship in such case by the laws ecclesiastical. And prohibition was granted upon demurrer and argument: for by the assent of the executor the interest was vested in the legatees, and became a chattel governable by the rules of the common law. That was the case of a chattel personal. But *Barton's* case (b), which came on to be argued on a demurrer to the prohibition, appears to distinguish between the case of a general and specific legacy. In as much as it appeared by the suggestion that the executors had consented to take as legatees, and by this means the property vested in them as legatees, and was altered from what it was when they were executors: for when they were executors one might have granted away all the goods; but after taking as legatees one could grant but a moiety. And it is added, when a certain thing, as a horse or a cow, is devised, as soon as the executor assents, the property vests in the legatee, and he may have an action at common law for the recovery of the thing: and therefore differs from the case in 2 Roll. Abr. 301., for that was for a legacy for which the common law gives no remedy. That must be understood to mean a legacy payable out of the general funds of the testator, in contradistinction to a legacy of a specific thing.

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LE BLANC J. It is admitted that upon the old authorities there is no doubt of the plaintiff's right to recover, unless they have been overruled by the case of *Deeks v. Strutt*. But that never could have been in the contemplation of the judges there; because it formed a ground of objection with them to the action, that it was a novel attempt to contend that the law would raise an implied assumpsit against an executor merely from the possession of assets. They thought that it would not: and in discussing that point they shewed the inconvenience which would result from extending the law in that respect further than it had been carried before. The case of *Chamberlaine v. Chamberlaine* (c) shews exactly the situation in which a specific legatee

(a) 2 Lev. 209.

(b) Freem. 289.

(c) 2 Eq. Caf. Abr. 465. 2 Freem. 141.

stands in the judgment of a court of equity, when the executor has assented to the legacy: that it vests the interest at law. Here there was no pretence stated even of any equitable ground why the plaintiff should not recover. It was not pretended that from any deficiency of assets the specific legatee was likely to be called upon to refund if he recovered: and even now if there were any ground for it, the Court of Chancery, even after the assent of the executor, might reach the property in the hands of the devisee, as appears from the case of *Chamberlaine v. Chamberlaine*.

Rule discharged.

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—
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against
Guy.

COUCHE against Lord ARUNDEL.

*J*ERVIS obtained a rule on a former day calling on the plaintiff to shew cause why the writ of latitat issued in this cause should not be superseded, and in the mean time proceedings be stayed. This was grounded on an office copy of the *præcipe* filed on issuing the writ of latitat, wherein the defendant was styled "*Henry Lord Arundel, Baron of Wardour*," &c. and therefore appearing to be a peer of the realm, and entitled to the privilege of peerage: and he referred to Lord *Banbury's* case, sued by the name of *Charles Knollys Esq.* where the like motion * was only denied, because it did not appear that he was a peer (a), and the Countess of *Huntingdon's* case (b), where it was granted. The defendant, he added, had appeared and filed common bail.

On this day the rule was made absolute on the motion of *Park*, without any cause shewn.

(a) This was the case of a disputed peerage, which has never since been allowed. 2 *Ld. Ray.* 1247. and *Salk.* 512.

(b) 1 *Ventr.* 298.

Tuesday,
Nov. 23d.

A writ of latitat issued against a peer superseded on motion, grounded on an office copy of the *præcipe*, in which the defendant was styled *Baron of W.*

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Tuesday,
Nov. 23d.GRANT *against* BAGGE and Others.

A writ of fieri facias, directed in the first instance to the bailiff of the *Iste of Ely* out of this court, is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. The bishop of *Ely* has not a palatine jurisdiction within the isle, though exercising jura regalia there. Process issued out of the courts at *Westminster* into the isle goes in the first instance to the sheriff of *Cambridge-shire*, who thereupon issues his mandate to the bailiff of the franchise.

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TRESPASS for breaking and entering a certain messuage and closes of the plaintiff in the parish of *Downham*, and in a certain extra-parochial place called *Byal Fen*, in the county of *Cambridge*, and taking and detaining certain goods and chattels of the plaintiff for thirty days, &c. Pleas, 1. Not guilty, on which issue was joined; 2. That the messuages and closes in which, &c. are situate in the *Iste of Ely* in the county of *Cambridge*; and that before the time when, &c. viz. on the 28th of Nov. 42 G. 3. one *J. Cocks* and one *G. Ridge* sued out of *B. R.* a writ of fieri facias, directed to the bailiff of the *Iste of Ely*, whereby our lord the king commanded him that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same and cause to be levied of the goods and chattels in his bailiwick of the plaintiff, as well, a certain debt of 22,000*l.* which *Biddulph, Cocks*, and *Ridge* had then lately in *B. R.* recovered against him, as also, &c. (stating the writ in the common terms, only with the name of the bailiff instead of the sheriff,) which writ afterwards, and before the return thereof, and before the said time when, &c. was delivered by *Cocks* and *Ridge* to the defendant *Bagge*, then and still being bailiff of the *Iste of Ely*. And the said *Bagge* and the other defendants then plead that at the time, when, &c. divers goods and chattels of the plaintiff liable to be taken in execution by virtue of the said writ were on the premises, and that by virtue of the said writ *Bagge*, as such bailiff of the *Iste of Ely*, and the other defendants in his aid and by his command, at the time when, &c. entered, &c. (the said messuage and closes being within the bailiwick of the said bailiff of the *Iste of Ely*), and took the goods mentioned in execution, &c.; without this that the defendants committed the said supposed trespass at any other place in the county of *Cambridge* or elsewhere than in the *Iste of Ely* aforesaid upon the occasion aforesaid. 3. The same plea, only stating the writ to be a testatum fieri facias. 4. Leave and licence. The plaintiff by his replication took issue on the 4th plea, and demurred generally to the second and third.

Wilson in support of the demurrer. This is an attempt to issue a writ from this court to the bailiff of the isle of *Ely* in the first instance,

instance, instead of to the sheriff of *Cambridgeshire* in the accustomed course. The sheriff is the immediate and proper officer of the king and all his courts to execute the writs of the common law, and he is sworn to do this truly; *Dy. 60 b. Plowd. 74.* and other authorities collected in *Dalton's Sheriff*, 96, &c. Original writs can be directed to no other than him; and it is of great public consequence and convenience to the suitors that there should be a certain known responsible officer for this purpose. Some exceptions which are to be found in the books prove the general rule; as where the sheriff is party to the suit, or supposed to be partial to one of the parties; and then on a suggestion entered on the roll the writ goes to the coroner; or where a place is out of all counties, as the palace of *Westminster*, when the writ is directed to the guardian or keeper of the palace; for he is then the immediate officer of the court. *Dalton*, 100. Another is the exception of the counties palatine, where the writ first goes to the Count Palatine or his officer, who thereupon makes his mandate to the sheriff. Now though *Ely* be in some old authorities called a county palatine; yet in *Cotton v. Johnson (a)*, it was determined not to be so, but only a royal franchise, like the cinque ports. The bishop therefore is no more than lord of a franchise having the return of writs, and his bailiff is bailiff of a liberty. But no writ either original or judicial is ever directed to the bailiff of a liberty, who is not the immediate officer of any court, but a mere servant to the lord, and a subordinate officer to the sheriff within his liberty (*b*). Whatever such a bailiff does must be by the authority of the sheriff: he cannot arrest without a warrant made to him by the sheriff on the writ which is in the hands of the latter. *Kilw.* 86. The bailiff of a liberty, as to his authority, differs not from a common bailiff, (called in the old books a bailiff-errant), though he does as to his interest and estate. But not being appointed by but imposed upon the sheriff, the sheriff is consequently not answerable for his miscarriages: therefore the bailiff himself is responsible for those, and for this purpose shall put his name to the return, and the party has his remedy against him; *Dalt.* 545. but still the writ itself is directed to the sheriff, and the bail-bond is taken in his name. *Dalt.* 544. But it may be said that though the writ

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(a) *Cartb.* 109.

(b) *Vide* the argument in *Wentworth v. Broadwater*, *Skin.* 413. to which reference was made.

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were improperly directed to the bailiff, yet being so, he will be protected in obeying it. As where defective process issues, which is erroneous and void, yet according to the Countess of Rutland's case (a) the sheriff or his officer, who is sworn to execute the process, may do so without offence; for as it is said he ought not to examine the judicial act of the Court. So *Dy. 60. b. 61. a.* and 10 *Rep. 70.* The principle of all these authorities is, that the sheriff, who is the known officer of the court, and punishable for disobeying its process, shall be protected in the execution of it, however erroneously or improperly issued; but certainly a stranger or any other who is not under the same obligation to act will not be entitled to the like indemnity. And if the bailiff be not the officer of the court, nor obliged by law to receive its process; as it would be no offence in him not to execute what he was not bound to receive any more than any by-stander, he cannot justify himself by that which is irregular in itself. There are not many cases in the books respecting the method of issuing and enforcing the execution of process in counties palatine. In *Chapman v. Mattifon* (b), it was attempted to be questioned whether a latitat ran into *Durham*: but the Court granted an attachment against the curfitor of the Chancery court of the county palatine for refusing to make out his mandate to the sheriff upon such a writ. [Lawrence J. The writ was probably directed to the bishop (c); though the attachment might go against the officer whose duty it was to have it properly executed on behalf of the bishop.] Supposing therefore that *Ely* was a county palatine, the directing of the writ in the first instance to the bailiff would be irregular. Though in *Needham v. Bennet* (d) an attachment issued against the sheriff of *Chester* for not returning a writ of venditioni exponas; he having before returned that he had seized, &c.: by which perhaps he might be considered as concluded to object. But the better reason seems to be that he was the immediate officer of the court. And so in *Jackson v. Hunter* (e), in an action on a bail-bond which had been given to the sheriff of *Durham*, the objection being that no writ to the bishop was stated; the Court held that it was only an irregularity, of which the bishop alone could take advantage: but that when

(a) 6 *Rep. 52.* and *Moor, 765.*(b) *Andr. 191.* and 2 *Sira. 1089.*(c) Such, it appears from 1 *Crompt. Prac. 12.*, is the proper form.(d) *T. Ray. 171.*(e) 6 *Term Rep. 71.*

the writ came to the sheriff, he was bound to execute it. These authorities, however, will not justify the bailiff, who is *not* the officer of this court. As to whether a defective writ of this sort were to be considered as an absolute nullity or to be avoided upon motion, he referred to *Parsons v. Lloyd (a)*, *Nesher v. Gennet (b)*, and *Sbirley v. Wright (c)*, in which it appeared to be so considered in general, at least with respect to others than the officer who was obliged to execute it, and with respect to writs on mesne process. He also suggested a doubt, on the authority of Lord C. J. *Willes*, Whether as the defendants had pleaded *jointly*, and two of them only justified under the writ in aid of and by the command of the officer, without stating any judgment, the justification were good, even for the officer, as it would not be good for the parties or even strangers? The doubt arose on what is said in *Moravia v. Soper (d)*, and *Morse v. James and others (e)*; the latter of which was an action of trespass against four, the plaintiff in the original cause, two officers, and one who was stated to be their servant, and to have acted at their request and in their aid and assistance. The officers and their servant pleaded jointly, and the plea was holden bad for other objections: but one of the objections was that the latter who was a stranger ought to have set out the proceedings, for want of which the plea was bad for all. And by Lord C. J. *Willes*—"It is said in *Briston v. Cole (f)*, that if one come in aid of the officer and at his request, he may justify as the officer may; but understood generally I doubt if this be law. A distinction I think ought to be taken between an officer who executes a civil process and a peace officer who may command any one to assist him: but we give no opinion," &c. [Lord *Ellenborough*. I do not believe there is any authority to warrant the observation there thrown out. Indeed it would be strange if those who act in aid and by the request of the officer should not have equal protection with himself. Can it be supposed that the sheriff is to execute the process single-handed?] The objection goes merely to the form of pleading.

Christian, contrà, as to the last point, observed that the justification by all the defendants was of one and the same act done, and therefore if the officer were justified, the others acting by

(a) 2 Blac. 845. (b) Cro. Eliz. 467. (c) 2 Ld. Ray. 775.
 (d) *Willes*, 30. (e) *Id.* 122.
 (f) *Salk.* 409. where it is said the Court *seemed* to hold, &c.

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his direction at the same time must necessarily be justified also. That it might be otherwise where different defendants justified in different respects, the one as party to the cause, the other as the officer executing the process, to whom the distinction taken in the cases cited might apply, as to the different manner of pleading their several defences: it was incumbent on the party to shew a cause of action; but it was sufficient for the officer to plead the issuing and delivery of the writ to him in fact; which was all that was done here; and therefore differed this case from *Philips v. Biran* (a) and the other cases referred to. As to the principal point, the cases referred to apply only to the bailiffs of private and inferior liberties: but the chief bailiff of the *Isle of Ely* exercises the functions of a sheriff, and stands in that relation to this court as much as the sheriff of any county palatine, as appears from acts of parliament and other authorities. [Lord *Ellenborough*. You cannot persuade us against all the authorities and practice in the law that *Ely* is a county palatine; and that the sheriff of *Cambridgeshire* has no jurisdiction in *Ely*: if so, all writs which have been heretofore directed to him out of this court to execute there for a long succession of years have been erroneous. The bishop, so far back as the year 1739, never thought of claiming so much, but only claimed the *mandavi ballivo* (b).] *Ely* is a royal franchise, having *jura regalia* or a palatinate jurisdiction. Lord *Coke* (c) calls it a *royal franchise* in contradistinction to a franchise of an inferior nature; and says that in divers statutes it is named the *county palatine of Ely*. The learned *Selden* (d), after speaking of the county palatine of *Chester*, says, "By reason also of the received notion of *palatine* in this sense, wherein it expresses the having *royal jurisdiction*, some other counties have been stiled *counties palatine*; though the lords of them have not had the title of *Earl Palatine*," &c. Then, after mentioning the duchy of *Lancaster*, he adds, "Upon the like reason was the name of county palatine fixed on the bishopric of *Ely*, and on *Hexamsire*," &c. So *Camden* (e) says that "the bishop of *Ely* has all the *rights* of a *county palatine*," and "appointeth a judge to hear and determine all causes arising within the said *isle*, &c. and hath his chief bailiff and under-

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(a) 1 *Sira*. 509.(b) *Vide* Book of Rules of K. B. of *Trin*. 1739, note.(c) 4 *Inst*. 220.(d) *Seld*. tit. *Of Honour*, part 2. c. 8.(e) *Cam. Brit. Eng.* edit. 492.

bailliffs for the execution of process." In the statute 27 *Hen. 8. c. 24.* which settled the jurisdiction of all counties palatine as it now stands, *Ely* is considered a liberty with a palatinate jurisdiction: it provides that all writs and process "in every county palatine, and other "*liberty*," shall be in the name of the king, but tested in the name of the person who has "such county "palatine or any other *such liberty*." No counties palatine or such liberties are previously mentioned in the statute; but reference is afterwards made to the Justice of *Chester* and his deputy; and provision is made that the bishop of *Ely* and his temporal steward shall be thenceforth justices of the peace within the isle independently of the king's commission: after which the Bishop of *Durham*, and the Archbishop of *York* (the latter with reference to the suppressed county palatine of *Hexamsbire*) are noticed in the same manner. Six years afterwards, in the stat. 33 *H. 8. c. 10. (a)*, all the counties palatine or palatinate franchises are enumerated; and it is enacted that nothing in that act shall extend to the *county palatine of Ely*. Again, the stat. 5 *Eliz. c. 23. s. 11.* enacts that a *significavit* shall be sent by *mittimus* to the chief justice or justices of the counties palatine of *Lancaster*, *Chester*, *Durham*, and *Ely*. The reason why *Ely* has not been uniformly called a *county palatine* is obvious; because the division of counties was more ancient than the grant of the jurisdiction; and therefore being only that *part* of the county denominated the Isle, it could not with the same propriety be called "a *county palatine*," as where *jura regalia* had been granted to an entire pre-existing county. In *Pigge v. Gardner (b)*, the court of *Ely* was holden to be a court of superior jurisdiction, and to have cognizance of all transitory actions, though not arising within the jurisdiction; which cannot be said of any inferior court; and it is put on the same footing with that of *Durham* in *Peacock v. Bell (c)*. Till within these thirty years fines were levied and recoveries suffered in the court of *Ely* of all lands lying within the isle; though since then, from the ready communication with the metropolis, it has been found more convenient to do that business in the court of Common Pleas. In *Gunter v. Gunter (d)* the Court say, "The writ of error to re-

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(a) This was a temporary act, given at length in *Rassal's* edition of the Statutes, but not in *Runnington's*.

(b) 1 *Lev.* 208.

(c) 1 *Sid.* 330. 1 *Saund.* 73.

(d) *Godh.* 380.

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move the record out of the court of *Ely* is directed *justiciarius noster*, which proves that this Court takes notice of him as the king's justice." And *Whitelock* J. observed, that it was since the stat. 27 *Hen.* 8. that it was directed *justiciario nostro de Ely*; for before it was *justiciario episcopi*. That shews that *Ely* was a franchise regulated by that statute. Since that statute the justices of *Lancaster*, *Durham*, and *Ely* sit by the same commissions, viz. by commissions of oyer and terminer, and gaol delivery, and of the peace, verbatim the same, under the great seal of *England*; the chancellor of the duchy granting the patent to hold pleas at *Lancaster*, and the Bishop of *Ely* at *Ely*; but the king grants that patent at *Durham*. The patents are all to the same effect. It seems then to follow that the chief bailiff of *Ely* is an officer having the same functions as a sheriff of a county palatine: and by the stat. 27 *H.* 8. c. 24. s. 14. all statutes against sheriffs, &c. for due execution of process, &c. shall be extended to all stewards and bailiffs of liberties and franchises having returns of writs, &c. with a proviso (s. 15.) that the latter may hold their offices above one year. This can only apply to liberties, &c. having *jura regalia*, and which were the subject of that statute, of which *Ely* is the only one now remaining. By this clause the Bishop of *Ely* appoints his chief bailiff for life the same as the Bishop of *Durham* appoints his sheriff for life. The chief bailiff acts in all respects within the isle, and has the same precedence as the sheriff within a county. [Lord *Ellenborough*. The bailiff, quoad the bishop, may be the same kind of officer as the sheriff is to this court; but there is no pretence to say that he is the officer of this court. *Lawrence* J. The 14th section of the stat. 27 *H.* 8. c. 24. only imposes on the ministers of the courts therein referred to, when acting in execution of the process of those courts, all the duties which are imposed on sheriffs and officers of the superior courts, when acting in the execution of our process.] The stat. 14 *Eliz.* c. 13. for dissolving the franchise of *Henhamshire*, provided that the sheriff of *Northumberland* should execute process, &c. in that part the same as in other parts of the county; which shews that he could not have done so before. No private bailiff can have such a writ directed to him. In a private franchise the process of the court always begins with the name of the steward or judge, and is a precept from him to the officer; but the writs sued out from the office at *Ely* are in the name of the king, as required by the statute of *Hen.* 8.; like those

those for *Lancaster* and *Durham*; and except in the teste, they are the same as those * sued out from the courts at *Westminster*. The first time that the courts at *Westminster* appear to have exercised a concurrent jurisdiction with the court at *Ely* in local matters, was in 2 *W. & M. Cotten v. Johnson (a)*, which was ejectment for lands in the isle; and after not guilty pleaded, a suggestion was entered, quod nullus justiciarius vel minister regis insulam illam ingredi potest ad aliquam jurat: extra, &c. and so prayed a venire to the next vill in the county of *Cambridge*, which was granted. In 4 *Inst.* 220. it is said, "Nullus justiciarius vel minister regis ingredi potest ad aliquod officium exercendum." And this is the uniform language in some charter or record in every reign for some centuries: all which is irreconcilable with the claim of the sheriff of *Cambridge* to enter the isle to serve his mandate; or if nullum responsum were given to it, that he should enter afterwards by a non-omittas. It appears from another reporter (b), that after the cause of *Cotten v. Johnson* had been tried at *Cambridge*, it was moved to arrest the judgment on the ground of a mis-trial. It was however denied, because though the bishop might demand cognizance of the cause, the defendant could not plead to the jurisdiction: the Court adding that *Ely* was not a county palatine, but only a royal franchise, like the cinque ports. The accuracy, however, of the similitude throughout may be doubted; for Lord *Coke* says (c), that the cinque ports have not jura regalia; which *Ely* undoubtedly has. But even with respect to the cinque ports, the same author says (d) that writs shall be delivered to the constable of *Dover* castle, of such things whereof he and the lord warden have jurisdiction. It appears then that the sheriff of *Kent* cannot send his mandate into the cinque ports, a jurisdiction acknowledged to be inferior to that of *Ely*. The freeholders of the isle have indeed the privilege of voting for members of the county, but by an award made in the 28 *Hen.* 8. between them and the county, which was afterwards confirmed in parliament, they were exempted from contributing to the wages of the knights of the shire, on payment of 200*l.* The record of this is amongst the muniments at *Ely*. The isle still has a separate county or isle rate, and a separate commission of the peace; and the judgments of the isle sessions, as at the assizes, must be executed by the chief bailiff of

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(a) 1 *Salk.* 183.(c) 4 *Inst.* 222.(b) *Cartb.* 109.(d) *Ib.* 223. and 2 *Inst.* 557.

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the isle, and not as in case of private franchises by the sheriff of the county. Even where the chief bailiff has arrested any by virtue of a mandate from the sheriff of *Cambridgeshire*, the debtor is not carried to the county gaol, but to the gaol of the isle, and the chief bailiff only is answerable for his escape. So if he levy the debt under a mandate, he keeps the money and pays it over to the plaintiff in the cause: and it is precisely the same to him, both in respect to his fees and liability, whether he execute the sheriff's mandate or the writ itself: though the party is benefited in the latter case by saving the additional fee that the sheriff would have charged if the writ had gone through his hands. [To a question from Lord *Ellenborough*, whether he could produce any instances of common process out of the superior courts directed to the bailiff of *Ely*: he answered that there were several instances within the last 15 years. But the Court signified that no stress could be laid upon so modern a practice.] But supposing the chief bailiff bound to execute process under the sheriff's mandate, it will not follow that the officer to whom the process has been directed in this instance is not justified in executing it. The action should have been brought, if at all, against the party or attorney who sued out the writ, and not against the officer who executed it; as appears in *Philips v. Biron (a)*: and there are many other cases to shew that though the writ may be irregular, erroneous, or void, still the sheriff is protected. [Lord *Ellenborough*. No doubt that is so in the case of sheriffs who are the known officers of the court bound to execute its process: but can any authority be shewn extending the same protection to bailiffs or other officers of inferior jurisdiction, to whom such process has been erroneously directed, and such as they have not been used to execute?] The last-mentioned case names *officers* generally; the others were cases of sheriffs of counties palatine.

LORD ELLENBOROUGH Ch. J. It would have been more satisfactory to have shewn any case where a writ directed improperly to an officer not accustomed to receive such, and which would have been quashed on motion, *quia improvidè emanavit*, was yet holden to justify the officer who took upon him to execute it. The bailiff may be the proper officer of the bishop of *Ely*, and his court; but as far as respects the process of *this* Court, the bailiff of the franchise of *Ely* is no more than the spe-

(a) 1 *Str.* 509.

cial bailiff of the sheriff. We may feel a little difficulty in being obliged to decide as we must in this case, on account of the process having issued out of this court directed to the bailiff, for the execution of which he is now sued: but as it so issued out of the common course and practice of the court, it was his duty to have applied here to have the writ quashed quia improvidè emanavit: instead of which, lured as it seems by the expectation of receiving his fees of office on a very large sum, he undertook to execute the process out of the course of his duty, and now attempts to justify himself as the immediate officer of the court. But all the authorities (drawn together in 2 *Inst.* 41. and other places) (a), shew that the sheriff is the immediate and proper officer of this court, known to be such, and responsible accordingly. Public convenience requires that there should be known responsible persons answerable to the Court for the due execution of its process, and to whom alone it ought in the first instance to be directed: these are generally speaking the sheriffs of counties (not being counties palatine), or if the sheriff be a party interested, then it issues to the coroner, and if he also be interested, to elisors. In all cases of ordinary process issuing out of the superior courts of *Westminster*, the writ is to be directed to the sheriff of the county into which it issues, whose known and sworn duty it is to execute it. Then how can we overturn the whole practice and principle of the law by sanctioning the issuing of this writ to the bailiff of this franchise of *Ely*, upon no other foundation than a practice of fifteen years, the very naming of which repudiates the right it assumes to support. It may as well be contended that in all cases we may direct our process to bailiffs-errant, and that they would be justified in acting by our command. But this would be a dangerous and unwarrantable alteration of the law, and cannot be maintained either on precedent or principle. On the other hand, however, as to the distinction attempted to be set up by the plaintiff's counsel between a justification under process in execution by the proper officer, and by one coming in aid of him, by his request, that the latter is bound to set out the judgment in his justification, as well as the writ; I must observe, that if such an one is to be responsible for the validity of the judgment, the sheriff will in every case be obliged to give an indemnity before he can get any person to act in his assistance;

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(a) Vide *ib.* 452, *Plowd.* 74. 6. and *Tidd's Pract.* 93. 655.

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a distinction which must cause no little inconvenience and impediment to the course of justice, and such as I am sure in my experience of pleading I have never known; and certainly it seems to be against all principle.

GROSE J. declared himself of the same opinion.

LAWRENCE J. It would have been material to the defendant's justification if he could have shewn a practice as far back as that of the cinque ports, for this Court to direct its ordinary process to the bailiff of *Ely*; but a practice of fifteen years only amounts to nothing. There may be privileges belonging to the franchise of the isle of *Ely*, which are not to be found in other cases; but none of these which have been shewn apply to the point in judgment before the Court. If it had been shewn that the sheriff of the county of *Cambridge* had no jurisdiction within the isle, by virtue of the statute of *Hen. 8.* it would have been to the purpose. But that statute only enforces the same duties on the officers of peculiar jurisdictions in respect of their own courts, which were imposed upon sheriffs in general. But it does not follow that because the sheriff of the county has no concern in executing the process of the Court in *Ely*, therefore he cannot execute the process of this Court there, by issuing his mandate to the bailiff of the franchise. It is of great advantage to the kingdom in general that there should be certain known and responsible officers to whom the process of the superior courts at *Westminster* is to be directed: but that advantage would be destroyed if we were to admit of the innovation now attempted: for by the same rule we might in all cases direct our process in the first instance to the bailiffs of franchises having the ultimate execution of process, instead of to the sheriffs.

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LE BLANC J. The bailiff of the isle of *Ely* will ultimately have the execution of the process in the cause; and therefore I should have been satisfied if any precedents had been found which would have warranted the directing it to him in the first instance: but we can only look to the sheriff as our officer to execute the process of this Court; and if the defendant has involved himself in any difficulty by executing our process directed immediately to him, it is by his own improper act in doing that which he must have known was out of the course of his duty: or at least, if he had any doubt, he should have first applied to this Court to be satisfied whether the process were properly directed to him. The court can only look in these cases to the
known

known officer of the law, who is the sheriff. And if we could vary the direction of process in one instance, I do not see why we should not do so in other cases of the like sort. Such a practice would take from the known officers of the court that responsibility which the law imposes on them, and which it is most material to the public should be preserved.

Judgment for the plaintiff.

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SAUNDERSON and Another *against* HUDSON.

Tuesday,
Nov. 23d.

THIS was an action by the plaintiffs, as payees of a bill of exchange, against the defendant, as one of the acceptors, and on the money counts; in which the declaration charged that *J. Hudson* was attached to answer the plaintiffs, &c. For that whereas the plaintiffs, the defendant, one *J. S.* and one *J. D. L.* (which said *J. S.* and *J. D. L.* have been in due manner outlawed in the said court of our said Lord the King, before the King himself, and still are, remain, and continue outlawed), one *B. C.* and one *D. B.* at the several days, &c. after-mentioned, were persons residing, trading, and using commerce, to wit, the said plaintiff and the said defendant, and the said *J. S.* and *J. D. L.* (who have been and are so outlawed as aforesaid) at London, &c. and the said *B. C.* and *D. B.* at Oporto in Portugal, &c. and being so severally resident, &c. the said *B. C.* and *D. B.* on, &c. at, &c. made their certain bill of exchange, &c. and then and there directed the same to the said defendant and the said *J. S.* and *J. D. L.* who have been, and are so outlawed as aforesaid, by which said bill they the said *B. C.* and *D. B.* requested the said defendant and the said *J. S.* and *J. D. L.* who, &c. at nine months date to pay that, &c. to the order of the plaintiffs, &c. and so it proceeded in the common form.

In declaring against *A.* upon a joint contract by *A.* and *B.* it is not enough to allege that *B.* was in due manner outlawed, without adding that he was outlawed in that suit.

To this there was a demurrer, assigning for special cause, that it is not alleged or shewn by the declaration that the said *J. S.* and *J. D. L.* have been or are outlawed upon the writ sued out against the said defendant in this suit, or upon any writ sued out against the said defendant jointly with the said *J. S.* and the said *J. D. L.*; or that the said *J. S.* and *J. D. L.* have been outlawed on any writ issued at the suit of the said plaintiffs, &c. On which there was joinder in demurrer.

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Gaflee was to have argued in support of the demurrer; but the Court called on

Espinasse contra, to support the declaration; who cited *Co. Lit.* 352 b. (a) upon estoppels; that where the record of the estoppel doth run to the disability of the person, there all strangers shall take the benefit of that record; as outlawry, &c. and referred to a precedent in *Lill. Entr.* like the present. But

The Court said that the passage in *Co. Lit.* related only to an outlawed plaintiff; and intimated that instead of pursuing the argument it was better for the plaintiff to amend (b); which being acceded to,

Leave was given to amend on payment of costs.

(a) And vide *ib.* 128. b. "If a man be outlawed at the suit of one man, all men shall take advantage of this personal disability."

(b) Vide *Guy v. Goddard*, 1 *Keb.* 642. and 1 *Sid.* 173. *Sheppard v. Baillie*, 6 *Term Rep.* 327. *Hastings v. Blake*, *Noy*, 1. *Griffith v. Middleton*, *Cro. Jac.* 425. *Brownl. Red.* 197.

Wednesday,
Nov. 24th.

Time en-
larged for
bail to sur-
render a
bankrupt un-
der examina-
tion.

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MAUDE against JOWETT.

HEYWOOD on a former day moved for a rule, calling on the plaintiff to shew cause why the time allowed for the defendant's bail to surrender him should not be enlarged till the first day of next term, and in the mean time proceedings be stayed. This was grounded * upon an affidavit stating that the plaintiff had obtained a verdict for 118*l.* at the last assizes for *York*, upon which he was now entitled to enter up final judgment, and that the defendant's bail were bound shortly to surrender him or forfeit their recognizance. That a commission of bankrupt had lately issued against the defendant; under which the first and second sitting of the commissioners were on the 1st and 2d of *November* instant, and the last sitting was fixed for the 4th of *December* next, when the bankrupt was required to finish his examination. That the commissioners resided at *Wakesfield*; and in case the bankrupt was surrendered within the ordinary time for discharging his bail, the commissioners would be under the necessity of coming up to *London* in order to take his examination in the King's Bench prison.

The

The application being admitted to be of a novel kind, the Court had some hesitation at first in granting a rule nisi; but after some consultation this was done. And now

Holroyd, who had on the former day suggested the novelty of the application as an objection to it, shewed cause against the rule on the same ground, alleging that no similar instance could be stated. But

LAWRENCE J. (the only Judge in court) thought it reasonable that the defendant should be permitted to pass his examination before he was surrendered in discharge of his bail, as no prejudice could ensue therefrom to the plaintiff. But being doubtful of the propriety of making the rule absolute in the terms in which it was moved; it was at last ordered that the rule should be discharged, upon the plaintiff's undertaking not to proceed to fix the bail before the first day of next term (a).

(a) It does not appear that the bail could be fixed before that time.

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WYATT against The Marquis of HERTFORD.

Wednesday,
Nov. 24th.

THIS was an action for work and labour, and on other common counts. The facts, as they appeared at the trial at the sittings after last term, were, that the plaintiff who had been employed to do certain work for the defendant, after its completion sent in the amount of his demand to Mr. *Hunt* the marquis's steward, who thereupon gave him his own draft on a banker, and the plaintiff gave him in return a receipt for the money on account of the defendant. The banker having refused payment of the draft, it was returned to *Hunt* by the plaintiff, who accepted another draft from him for the amount, payable twenty-one days after date, without making any representation of the matter to the defendant. The second draft also being refused payment, and *Hunt* becoming insolvent, application was at last made to the defendant, who refused payment, on the ground that *Hunt* had more than sufficient funds of the defendant's in his hands at the time. If one take the security of the agent of the principal with whom he dealt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security fail. Aliter if the principal do not shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time.

1802.

—
WYATT
against
The Marquis
 of
HARTFORD.

time to have satisfied the plaintiff's demand, and had gone away much in arrear to the defendant on the balance of his accounts; and that by the plaintiff's having accepted *Hunt's* security for the money instead of applying to the defendant himself, (especially after having given a receipt as for the money, by which it would appear to the defendant in *Hunt's* account that the money had been paid,) and that too after the first draft had been dishonoured, he had thereby substituted *Hunt* for his debtor instead of the defendant, and had discharged the latter. And Lord *Ellenborough* C. J. being of that opinion, a verdict passed for the defendant.

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Gibbs on a former day moved for a new trial, admitting that that the conclusion drawn at the trial might have been true, if it had appeared that the defendant had sustained any injury by the want of communication to him from the plaintiff of the non payment of *Hunt's* draft; as if it had been shewn that between the time of the plaintiff's giving his receipt and the time of *Hunt's* absconding in the defendant's debt, the defendant had come to any settlement with *Hunt* upon the supposition that the plaintiff's demand had been satisfied: but no such evidence was given; and the onus probandi lay on the defendant to shew how he had been injured by the plaintiff's omission. A rule nisi was accordingly granted: and on this day, without further argument,

Lord *ELLENBOROUGH* Ch. J. said that there must be a new trial; for on revising his note of the evidence, it did not appear that the defendant was in any way prejudiced by his steward having given his own security to the plaintiff, and taken the latter's receipt. That if it had appeared that the defendant had in the interval inspected the steward's accounts, and had in any manner dealt differently with him on the supposition that this demand had been satisfied as the receipt imported, no doubt the defendant would have been discharged; for it was clear that *Hunt* had sufficient money of the defendant's in his hands to answer the demand.

Rule absolute.

1802.

DOE *against* DARNTON.*Thursday,*
Nov. 25th.

IN *Hilary* term 1800 the present defendant commenced an action in this court against *John* and *Thomas Steel* for money paid to their use, to which action *John Steel* pleaded the general issue, and his discharge under the insolvent debtors' act of the 37 *Geo. 3. c. 112.* and *Thomas Steel* pleaded the general issue only; and a verdict was found for *Darnton*, the then plaintiff, and judgment obtained for 56*l.* 10*s.* which (with the interest thereon to this time 57*l.* 11*s.*) amounted to 623*l.* 1*s.* After which an ejectment upon the demise of *John Steel* was brought by his assignees under the said insolvent debtors' act to recover the possession of certain premises belonging to *John Steel*, of which possession had been obtained by *Darnton*, under an agreement between him and the assignees under a commission of bankrupt issued against *John Steel*; in which ejectment the lessor of the plaintiff recovered: and this was followed up by the present action for mesne profits, in which the plaintiff recovered judgment for 1047*l.* Whereupon a rule was obtained on a former day calling upon *John* and *Thomas Steel* to shew cause why upon payment into court of 423*l.* 19*s.* (the balance of the two adverse demands) the defendant should not be at liberty to set off the judgment obtained against them by the defendant against that obtained by the plaintiff on behalf of the assignees of *John Steel* against the defendant, and for staying proceedings, &c. Notice of which rule was directed to be served on the plaintiff's attorney.

Garrow and *Marryat* now opposed the rule, upon the short ground that as there was no reciprocity or mutuality in the demands, the Court would not do that in a summary way which could not have been done by a plea or notice of set-off in any form of action, the defendant's demand being against two, which he wished to set off against a demand by the assignees of one of them.

Giles, in support of the rule, relied on the case of *Mitchell v. Oldfield (a)*, where a judgment recovered by *C.* against *A.* and *B.* was set off against one recovered by *A.* against *C.*; not as falling

A judgment recovered by *A.* against *B.* and *C.* will not be set off, on application to the general jurisdiction of the court, against another judgment recovered against *A.* by the assignees of *B.* under an insolvent debtors' act, the interest of third persons intervening, who have peculiar trusts by the statute.

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(a) 4 *Term Rep.* 123.

1802.
 ———
 Dos
 against
 DARTON.

within the statutes of set-off, but by the general jurisdiction of the Court in such matters. And though he admitted that this was not a mutual credit, otherwise it might have been set off under the 57th section of the insolvent debtors' act, yet it came equally within the equitable jurisdiction of the Court as in the case cited. But

The Court observed, that in the case cited no insolvency had intervened, so as to introduce the claims of third persons: and they thought that when the legislature had made the assignees trustees for certain purposes it was not competent for them to carve out of the estate other interests than those for which it was so bestowed. And Lord *Ellenborough* C. J. expressed a strong disinclination to extend the power of setting off debts on general grounds of equity beyond the line which the legislature had thought proper to mark out.

Rule discharged.

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Friday,
 Nov. 26th.

By s. 19. of
 stat. 13 Geo 3.
 c. 78. where
 an order of
 justices has
 been made
 for stopping
 up a road, an
 appeal is
 given to "the
 " party
 " grieved by
 " any such
 " order or
 " proceed-
 " ing at the
 " next Quar-
 " ter Sessions
 " after such
 " order made
 " or proceedings had," &c. held that the appeal must be made to the Quarter Sessions next after the order made, without reference to any notice received by the appellant of such order.

The KING against The Justices of STAFFORDSHIRE.

TWO justices on the 2d of December 1800, made an order under the stat. 13 Geo. 3. c. 78. for turning part of a highway in the liberty of *Bilston* in the hundred of *Lisdon* in the county of *Stafford*. No appeal to the Quarter Sessions was lodged till the *Easter* Sessions, 29th April 1802, when it was adjourned by the Court for want of sufficient notice having been given before. At the Sessions following, on the 15th of July, the Court discharged the order made at the former sessions for entering and adjourning the appeal, on the ground of the appeal having been preferred too late, according to the case of *The King against The Justices of Pembroke-shire* (a). It was thereupon moved on a former day and a rule obtained for the defendants to shew cause why a writ of mandamus should not issue commanding them, at the next general Quarter Sessions of the Peace holden for the said county, to receive the appeal and enter continuances as

(a) *Ante*, 2 vol. 213.

from the sessions when it was first lodged, and to proceed upon, hear, and determine the same. This was founded on affidavits stating the facts before mentioned; by which it also appeared that the only evidence that any of the appellants had had notice of the stopping up of the road was that one of them, having about 14 days before last *Easter* sessions received intelligence that the road had in fact been stopped up, had applied to know the reason of it to Mr. *Loxdale's* agent (the person by whose directions it was so stopped), when he was informed that Mr. *Loxdale* was in *London*; but no notice was even then given that the old road had been stopped by an order of magistrates, and such information was not formally given till the 26th of *April* 1802, three days before the appeal was lodged. The affidavits further stated the grievance to the appellants from the stopping up of the old road, which increased their distance a third of a mile from a certain town in the neighbourhood.

Clifford was to have shewn cause against the rule: but

The Court called on the counsel in support of it to shew how this case was distinguishable from that of *The King* against *The Justices of Pembrokehire*.

Gibbs, Touchet, and Ryder shortly urged the same arguments which had been adduced in that case in support of the rule for the mandamus; stating that the appeal clause, *s. 19. (a)* of the stat. 13 *Geo. 3. c. 78.* would be wholly nugatory, unless it were construed to give the appeal to the party grieved at the next sessions *after notice* of the order; the order itself not being a matter of publicity. That here there was not even that evidence of general notoriety of the order having been made which there was in the case referred to; but the parties grieved were wholly taken by surprise: and the appeal was lodged at the very next sessions after notice of the order and of the grievance, which was not done in that case.

Lord ELLENBOROUGH Ch. J. Whatever hardships the parties grieved may labour under in this case, we can only follow the directions of the statute, which has expressly limited the appeal to be made to "the next Quarter Sessions after such order made or proceeding had," &c. Now it is attempted to substitute the words "after notice of such order made," in lieu of the words in the statute "after such order made;" but they are different things, and

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(a) Vide *ante*, 2 vol. 217. where the clause in question is set forth.

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the legislature having made use of the latter words, we cannot say that the appeal may be made at the next Quarter Sessions *after notice* of the order. It is however a case of great grievance and hardship where the interests of parties are thus invaded by an order made behind their backs; and may be a good ground to apply to parliament for a revision of the clause of appeal; but we cannot remedy the abuse.

LAWRENCE J. In the case referred to we held that the words ("after such order made) *or proceeding had as aforesaid,*" upon which latter words stress was laid, meant something the same as *order*; some proceeding before the magistrates, as that on the writ of *ad quod damnum*, and not any act done in execution of the order. The defect which gives rise to the grievance complained of is in the statute itself.

LE BLANC J. What is now contended for is that the parties grieved, not having received notice of the order till a short time before last *Easter* Sessions, were in time to lodge their appeal at that Sessions, though the order had been made so long before: but it is impossible that can be the meaning of the act; for in the case of a public highway, all the King's subjects may be said to be interested, and to have a right to appeal against an order for stopping it up: and therefore if the right of appeal were to depend on personal notice of the order to the appellant, there never would be an end of the time for appealing; though it is clear that the Legislature meant that at a certain period the question should be at rest.

Per Curiam,

Rule discharged.

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Friday,
Nov. 26th.

BOUBET against KITTOX.

A foreigner, whose general residence is abroad, and who only landed here

for a temporary purpose, viz. to make an affidavit to hold the defendant to bail, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was sworn, within the meaning of the rule of court, Mich. 15 Car. 2.

THE plaintiff made an affidavit to hold the defendant to bail for 440*l.*, which appeared to be sworn at *Plymouth* on the 31st of *August* 1802, and in which the plaintiff described himself as *Louis Boubet of L'Orient, in the department of Morbion,*

native

native of *St. Foy*, in the department of *La Gironde*, in the Republic of France : on which

Lawes obtained a rule nisi on a former day for discharging the defendant out of custody on filing common bail, for want of a proper addition of the plaintiff in this country. The rule of court, *Mich. 15 Car. 2.* requiring the addition of the party making an affidavit, which was recognized in *Jarrett v. Dillon* (a), requires in general terms "the true place of abode and true addition" of the deponent ; but as the reason of it was to enable the defendant to discover who the plaintiff was, and where was his place of abode, that would be defeated if it were sufficient for the party making the affidavit, who must be in this country at the time, to give his foreign place of residence : and here it appears that the plaintiff was at *Plymouth* when the affidavit was sworn, and could therefore have given a more certain description of himself conformable to the truth.

Gibbs and *Dampier* shewed cause a few days ago, and insisted on the propriety of the plaintiff's description of his place of abode, which was at the place stated in his affidavit, having merely landed at *Plymouth* for the purpose of making the affidavit ; and therefore that could no more be said to be his place of abode than a place on the road through which a person accidentally passes in travelling. They insisted that this manner of description was not only more consonant to truth and the real meaning of the rule, but warranted by the common practice in similar cases.

The Court were at first of opinion that the description was not sufficient within the meaning of the rule of court ; considering that as the affidavit appeared to be sworn at *Plymouth*, the plaintiff might have had a temporary residence there, sufficient to warrant a description of his place of abode in this country : but they afterwards desired that the case might stand over for further consideration ; and on its being mentioned again on this day, and the fact not being disputed that the plaintiff had no domicile at *Plymouth*, but only landed there for a temporary purpose, they

Discharged the Rule.

(a) *Ante*, 1 vol. 18.

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against
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Friday,
Nov. 26th.TAYLOR *against* PHILLIPS.

The service of process on a Sunday is absolutely void by the stat. 29 Car. 2. c. 7. s. 6. and cannot be made good by any subsequent waiver of the defendant, by his not objecting till after a rule to plead given.

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BARROW obtained a rule calling on the plaintiff to shew cause why the proceedings should not be set aside for irregularity, with the costs of the application, &c.; grounded on an affidavit that the defendant was served * with a copy of the writ on a Sunday, the 13th of June last; and he relied on the stat. 29 Car. 2. c. 7. s. 6. which prohibits the service or execution of any civil process on the Lord's day, and directs "that the service of every such writ shall be void to all intents and purposes;" and referred to *M'Ilham v. Smith* (a).

Marryat shewed cause, on the ground that the irregularity had been waved by the defendant. It appearing by an affidavit that bail had been filed according to the statute on the 28th of July, and notice of declaration served on the 7th of August, and a rule to plead on the 6th of November: and that on the 15th of July, five weeks after the service of the writ, the defendant applied to the plaintiff's attorney to settle the debt, and after that the defendant's attorney applied for an account of the debt and costs, which was sent to him; and no objection was then made to the service of the process, by which the plaintiff was encouraged to proceed and to incur additional expence.

The Court however made the rule absolute for setting aside the service of the writ and the subsequent proceedings, as contrary to the statute. And

Lord ELLENBOROUGH Ch. J. said that it was a matter of public policy that no proceedings of the nature described in the statute should be had on a Sunday; and therefore the regularity or irregularity of them could not depend on the assent of the party afterwards to waive an objection to such proceedings, which were in themselves absolutely avoided by the statute.

(a) 3 Term Rep. 86.

The KING *against* GEORGE MARKS and Others.

1802.

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Nov. 26th.

THE defendant *Marks* and four other shearmen were brought up by writs of habeas corpus from the gaol of *Devizes* in the county of *Wilts*; and the warrants of commitment and the depositions taken before the committing magistrates were returned at the same time. In the warrant of commitment the defendant *Marks* was stated to be "charged on the oath of *T. B. of Trowbridge*, cloth-worker, with felony, in having, in or about *June* last, been aiding and assisting at and present at and consenting to the administering or taking an oath or engagement by *James May*, of *Trowbridge* aforesaid, cloth-worker to the said *T. B.*, contrary to the statute in that case made and provided," &c. (a) without any other specification of the offence. But upon the depositions returned, which were very full, the offence was stated with sufficient precision, and appeared generally to be this; that the defendants were journeymen shearmen employed by the clothiers in and about the town of *Trowbridge* in *Wiltshire*. That of late there had been disputes between the master clothiers and the journeymen concerning the rate of their wages, and that certain of the journeymen calling themselves a committee, (but by whom or in what manner delegated did not appear), of whom the defendants were some, met regularly once a-week in *Trowbridge*, and took upon them to act as a regulating body for the journeymen shearmen in that part of the country; that persons went as from the committee to the master clothiers to know their resolution respecting the wages; and that the committee had lately required every journeyman shearman to take a certain oath as after-mentioned. The oath in question was administered about six weeks before the depositions were taken, when *T. B.*, named in the warrant of commitment, was called before the committee, of which the defendants were members, who were then sitting at a public house in *Trowbridge*, when one who acted as clerk to the committee told him that he must take an oath, and admini-

The unlawful administering, by any associated body of men, of an oath to any person purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the stat.

37 Geo. 3. c. 123., though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition.

Though a warrant of commitment for felony be informal, yet if the corpus delicti appear in the depositions returned to the Court, they will not bail but remand the prisoner.

(a) All the other commitments were in the same form, except that of *James May*, in which he was stated to be "charged on the oath of *T. B. of T.* aforesaid, shearman, with felony, in having, in or about the month of *June* last, unlawfully administered an oath or engagement to him the said *T. B.* contrary to the statute in that case made and provided."

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nistered it to him in these words, "*You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets, so help you God.*" Immediately after which he had a ticket given him by one of the stewards which he was informed was of the same kind as was used in shearmen's clubs in *Yorkshire*, and that if he went there it would enable him to get work: and in order to compel every journeyman shearman to belong to the community, the members of it objected to work with those who had not such tickets.

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On the other hand, the facts of the existence of any such committee, and their meeting at the public house for the purposes stated, and the administering of any oath by them, were all denied by the defendants; from whose affidavits it also appeared that disputes had for some time before existed in the trade relative to the mode adopted by some masters of paying the shearmen's wages sometimes in goods, and those frequently damaged; (called paying truck); from whence great inconvenience and distress arose to the workmen on account of the difficulty of disposing of them, except at a loss. And that *T. B.* having been censured by some of the shearmen for having received his wages in that manner, he had voluntarily declared that he would not do so again, and by way of pretended sanction had kissed a book which happened to be there.

The Court having been moved to bail the defendants upon the insufficiency of the warrants of commitment,

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Gibbs and *Reads* opposed the motion, on the ground that however informally the warrants of commitment were framed, the Court would not bail the defendants, if from the depositions returned by the committing magistrates it appeared that they had been guilty of an offence amounting to felony within the statute 37 *Geo. 3. c. 123 (a)*. It is true that the preamble of the act only

(a) The act is intitled "An act for more effectually preventing the administering or taking of unlawful oaths;" and after reciting that "whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his majesty's forces by sea and land, and others of his majesty's subjects, from their duty and allegiance to his majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traiterous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered;" enacts, "That any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered,

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only recites certain mischiefs which had arisen from persons attempting to seduce soldiers, sailors, and others from their duty and allegiance to the king, and to incite them to mutiny and sedition, to give effect to which they had imposed pretended oaths upon them; but the enacting part goes much further, and comprehends not only the unlawful administering of oaths for such purposes, but also in general terms, oaths administered, "to obey the orders or commands of any committee or body of men not lawfully constituted; or not to inform or give evidence against any associate confederate or other person, or not to reveal or discover any unlawful combination, &c. or any illegal act," &c. all which descriptions of offences, named in the disjunctive throughout the clause, fasten upon the defendants in this case. And this enlarged construction is warranted by the title itself of the act, which is general against the administering or taking of *unlawful oaths*. Here it is clear that the oath charged to have been administered was for the illegal purpose of supporting a combination and conspiracy amongst the shearmen at *Trowbridge*, in *Wiltshire*, for raising their wages, and other purposes connected with the trade.

Erskine, *Burroughs*, and *Jekyll*, in support of the application, insisted that the words of the statute relied on, however large in themselves, must be confined to the objects stated in the pream-

"nistered, or be aiding or assisting at, or present at or consenting to the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement; shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years. And every person who shall take any such oath or engagement, not being compelled thereto, shall on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years."

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ble, namely the administering of unlawful oaths for the purposes of mutiny or sedition, * and could not have been intended to reach a case, where it was plain that the fact, if it existed at all, arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone.

If the administering of oaths for *any* unlawful purpose had been within the contemplation of the legislature in framing so penal a statute, it would have been nugatory to have introduced what is stated in the preamble, and in the first part of the enacting clause; and instead of specifying the particular objects there pointed at, they would at once have declared in terms that the administering of unlawful oaths of the nature described, for *any* purpose, should be felony. The general words therefore which follow must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition; and then all the different sorts of oaths, which are only so many classes of the same offences, will have one uniform and sensible construction, tending to the suppression of mutiny and sedition, endeavoured to be propagated by any of the means described. By the introduction of the relative word *such*, which is to be found in the former part of the clause, into the latter parts, and which the sense requires, the whole will be rendered consistent, which otherwise will be incongruous; for it never could have been intended that the administering of an oath *to be* of any association, &c. should only be felony, when such association was "formed *for any such purpose*," i. e. of mutiny and sedition, as the act describes it; and yet that to administer an oath "to obey the orders of" "any committee or body of men not lawfully constituted," whatever the purpose might be, should be felony.

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Lord ELLENBOROUGH Ch. J. If I entertained any reasonable degree of doubt upon the meaning of the act, I should readily listen to this application; but I cannot bring my mind to doubt but that the facts disclosed on the whole of the depositions charge the defendants with an offence within the statute. It certainly does appear from the preamble of the act, as if it were mainly directed against combinations for purposes of mutiny and sedition; but there are words sufficient in the enacting part to satisfy the preamble; and after dealing with offences of that description, the act goes on in much more extensive terms, and embraces other more general objects: and as there is no word of reference in the latter part, as *such*, which is to be found

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in the former part of the clause, I see no reason for restraining the common import of the words used, which extend to all illegal associations and combinations of men, in respect of which oaths of the nature described in the act are administered. Amongst these are to be found the prohibitions, on which I rely, against the administering of any oath or engagement, "*not to reveal or discover any unlawful combination or conspiracy,*" and *not to reveal or discover any illegal act done or to be done;*" within which the offence in question falls. It appears clearly from the depositions that an unlawful combination existed at the time amongst a certain description of persons, of whom these defendants are some, in furtherance of whose purposes the unlawful oath stated was administered. The words of the oath import to bind the party taking it to be a true member of the combination or conspiracy, which, it appears, was governed by the committee by whose directions the oath was administered; the party thereby engaged to do no hurt to any of the persons engaged in the combination, and not to reveal any of their secrets; and those who did not enter into the same engagement were not to be permitted to work with any of its members. Is not this then an unlawful combination, and is not the taking of an oath for such a purpose an illegal act? The very terms of the oath fall in part within the immediate letter of the statute: but that is not necessary to bring a case within it, if the oath purport to bind those who take it to any of the illegal purposes described in the act. From a view of the whole scope of the act it appears to me highly probable that this is a case which will be found to be within the true spirit as well as the letter of it: and that is sufficient to guide our discretion in disposing of this application. But the judgment of the Court now will not bind the parties; and if, on a further review of the act, it shall be thought to require a narrower construction, as the offence will appear on the face of the indictment, the defendants, if convicted of the fact, will have the benefit of moving in arrest of judgment. At present our opinion only concludes as to the question of bailing them. As it appears then from the depositions that there is a corpus delicti within the meaning of the act of parliament which constitutes it felony, it is our duty to remand the prisoners; though, if upon adverting to their affidavits, we had seen sufficient reason to doubt the truth of the charge, the Court, with anxious regard to the liberty of

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the subject, of which they are the depositary, would have given them their due weight in the decision of the present question.

GROSE J. There is no doubt of the power of this Court to bail, if they see occasion, in all cases of felony, * even in case of murder, though there should be no doubt as to the validity of the warrant of commitment. On the other hand there is as little doubt as to their power of remanding, notwithstanding the warrant of commitment be defective; and it is the constant practice of the Court to remand prisoners in such cases, if it appear on reading the depositions that there is a fair ground to authorise them. Then as to whether the offence imputed to these defendants fall within the act in question, it is admitted that the letter of it in the latter part of the enacting clause presses hard upon the case: and upon a view of the whole statute, I cannot say that it was not meant to extend to an oath taken to conceal the objects and acts of such an illegal combination as this appears to be. No word of reference, as *such*, is to be found in the latter part, in order to connect it with the objects mentioned in the first part of the clause; and the omission of it shews that it was the intention of the legislature to extend the objects of the act beyond those before-named. Such is the inclination of my mind at present. I give no express opinion that the case is within the act; but I cannot say it is not so. At present the prisoners must be remanded; and they will have more than one opportunity of discussing the question of law hereafter. If the case be not within the act, it will probably so appear on the face of the indictment: but should that not be so, nothing is more frequent than to reserve cases of doubt appearing upon the evidence for the consideration of all the judges. It would be rather premature therefore for us now to decide the question expressly: it is enough to say that the preponderance of our opinion, at least of mine, is that it is a case within the act. As to the particular facts disclosed, it is better not to comment on them at present; it is sufficient to observe that they are not such as to warrant us in permitting the prisoners to be bailed.

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LAWRENCE J. On this occasion I think the defendants ought not to be bailed. It is not for their advantage at this period to discuss much either the law or the facts of their case: it is therefore sufficient for me to say that at present I do not agree with the objection urged by their counsel that this is not a case within the act of parliament. It is true that the preamble

and

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and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition: but it is nothing unusual in acts of parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law. And here the latter part of the clause is conceived in general terms, without any word of reference to the immediate objects of mutiny or sedition before-mentioned. Combinations formed for such purposes are undoubtedly highly prejudicial to the state, and might be the primary object of the attention of the legislature; but I cannot say that combinations like this, which strike at the root of the trade of the kingdom, may not be, though perhaps not so immediately, yet ultimately as mischievous in their consequences, and in the event beget a danger to the state itself to an extent beyond the power of the government to repress.

LE BLANC J. This Court have clearly a right to bail the parties accused in all cases of felony, if they see occasion, wherever there is any doubt either on the law or the fact of the case. And it is equally clear that though the warrant of commitment be informal, yet if upon the depositions returned the Court see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, they will not bail but remand them. The same rule applies with respect both to the law and the fact: unless we see reason to doubt the truth of the fact charged, the prisoners must be remanded: and the same consequence follows, unless we see reason to doubt whether the fact charged constitute any offence within the law. Now at present I see no reason to doubt in either respect, and therefore the prisoners must be remanded (a).

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The prisoners were thereupon taken out of court in custody of the same persons by whom they were brought up.

Note.—In cases of defective commitments the practice has heretofore been merely to draw up a rule remanding the prisoners in general terms to the same custody as before, and this was at first designed to be done in the usual form in the present instance: but it occurred to the officers of the crown office to suggest an alteration of the practice in this respect, founded upon the consideration that prisoners thus remanded might renew the same

(a) Vide *R. v. Judd*, 2 Term Rep. 255.

application

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application to another Court or judge; and therefore the rule was ultimately drawn up in this form.

Friday next, after 15 days of St. Martin, in the forty-third year of King George the Third.

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England. } *George Marks* being brought here into court in
Wiltshire. } custody of the keeper of his Majesty's gaol at
Devizes, in and for the county of *Wilts*, by virtue of a writ of habeas corpus, it is ordered that the said writ, and the return made thereto, be filed. And upon reading the several informations upon oath of, &c. returned in obedience to a writ of certiorari, directed to *R. L.* and *T. H. P.* two of his Majesty's justices of the peace in and for the county of *Wilts*; and upon hearing counsel on both sides; it is ordered that he, the said *George Marks*, be now discharged from his imprisonment by virtue of the warrant in the said return mentioned; and that he the said *George Marks* be recommitted to the custody of the said keeper, for unlawfully and feloniously being aiding and assisting at and present at and consenting to the administering and taking of an oath or engagement, purporting and intended to bind *T. B.*, the person taking the same, to be of an association, society, and confederacy, formed to disturb the public peace, and not to inform or give evidence against any associate, confederate, or other person, and not to reveal or discover a certain unlawful combination and confederacy, and not to reveal and discover a certain illegal act done against the peace, &c. and also against the terms of the statute in such case made and provided; to be by him kept in safe custody until he shall be from thence discharged by due course of law.

Vide fl. 31
 Car. 2. c. 2.
 f. 3. and fl.
 37 Geo. 3.
 c. 123.

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Saturday,
Nov. 27th.OAKLEY *qui tam* against GILES.

IN an action to recover penalties on a statute, the defendant was served on the 3d of *November* with a copy of process in the name of *William Giles*, his true name* being *Edward*; in consequence of which he did not appear, but the plaintiff afterwards served him with notice of declaration by his right name, and proceeded to judgment against him for want of a plea, and sued out execution last night.

Park thereupon moved to set aside the proceedings for irregularity, and cited *Doe v. Butcher* (a), and *Corbett v. Bates* (b), in which the distinction was taken in this respect, where the defendant himself appears when sued by a wrong name, and where the plaintiff enters an appearance for him, according to the statute by his *right* name: in the latter case the defect is not cured, and the Court will set aside the subsequent proceedings for irregularity.

The Court, however, refused a rule; saying that the defendant having been the real person served with the process, ought to have pleaded in abatement, and could not take advantage of the misnomer in any other manner than that which the law had marked out: if this were allowed, pleas in abatement for a misnomer might be struck out of the books.

Park, at the close of the day, renewed his motion, and obtained a rule nisi for setting aside the proceedings on † payment of costs, upon a further affidavit, stating that the defendant's attorney had been misled by the authorities and books of practice, and had advised the defendant not to appear and defend himself against what was deemed to be nugatory process; and also swearing to merits.

(a) 3 *Term Rep.* 611.

(b) *Ib.* 660. In the former of these cases it appears that the plaintiff had filed common bail for the defendant by his *right* name, after having sued him by a *wrong* one: and in the latter the plaintiff sued out a writ against a justice of peace for an act done in his office in a *wrong* name, and an *alias* by his *right* name, which latter was out of time, unless it could be connected with the writ. In the present case it did not appear but that the plaintiff had filed common bail for the defendant in the same name by which he had sued him; though he declared against the defendant by his right name.

If a defendant be served with process by a *wrong* christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the Court will not set aside the proceeding for irregularity, merely on the ground that the defendant never appeared; because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits.

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1802.

Saturday,
Nov. 27th.

TAYLOR *against* HIGGINS.

One who became surety for the defendant before his discharge under an insolvent debtors' act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c. for the old debt, cannot thereon hold the defendant to bail by an affidavit as for so much money paid to his use.

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A Rule was obtained calling on the plaintiff to shew cause why the bail bond given by the defendant should not be delivered up to be cancelled on filing common bail, on the ground, stated at the time of obtaining the rule, that the plaintiff's cause of action, if any, had accrued before the 1st of *March* 1801 (a), and that the defendant had taken the benefit of the last insolvent debtors' act. But ultimately the question came to this, whether the plaintiff were entitled to hold the defendant to bail for 120*l.* upon an affidavit stating the cause of action to be for so much money paid, laid out, and expended by the plaintiff for the defendant's use.

This application was grounded on an affidavit of the defendant, stating that being indebted to Mr. *Creswell* about four years ago for business done by him as a proctor, and being pressed for payment he prevailed on the plaintiff, *Taylor*, to join with him in a bond to *Creswell* for 150*l.* That in *August* 1800, the plaintiff and the defendant being both arrested, and then in custody at the suit of *Creswell*, in an action on the bond, the defendant paid the costs and part of the debt, and, together with the plaintiff, executed to *Creswell* a new warrant of attorney for 120*l.*, the remainder of the debt. In *December* following the defendant was arrested at the suit of *Creswell*, and detained in custody; and in *July* 1801 the present plaintiff and the defendant, being both then in custody, a declaration, by way of detainer was lodged against them by *Creswell*; and on the 10th of *August* following, the defendant took the benefit of the last insolvent debtors' act, and was discharged under it. In *September* 1802, the defendant was arrested and holden to bail in this action by *Taylor* for 120*l.* on the affidavit to hold to bail before-mentioned: whereupon application was made by the defendant to *Creswell*, to know whether *Taylor* had paid him any money on account of the defendant, which was answered in the negative; but that after the defendant's discharge under the insolvent debtors' act *Taylor* had given *Creswell* a new bond and warrant of attorney for the old debt of 120*l.* (for which this action was brought), no

(a) The last insolvent debtors' act, 41 *Geo. 3. c. 79.* refers to this period for the discharge of debtors in custody.

part of which had yet been paid; but as appeared by the plaintiff's affidavit, he had at that time paid to *Cresswell* about 7*l.* or 8*l.* for costs; and he also swore that when such new security was given, *it was accepted as payment and satisfaction of the old debt*, and the old bond and warrant of attorney were cancelled.

Marryat shewed cause, and after observing that the objection had taken a new shape, not on the construction of the insolvent debtors' act, but on the validity in law of the debt sworn to in the plaintiff's affidavit to hold to bail, contended that the new security which was accepted by the creditor as payment and satisfaction for the old debt, was the same in law as if such old debt had been paid in money. And he cited *Barclay* and *Another v. Gouch* (a), where the defendant being a publican, at whose house a benefit club was holden, the plaintiffs had become his sureties for the subscription money of 50*l.*; and the defendant having become a bankrupt the club had called upon the plaintiffs for the money, and had taken their note of hand for the same; and afterwards brought the action against the defendant, as for so much money paid to his use after the bankruptcy. And Lord *Kenyon* held that as the club had consented to take the note in payment as money, it was to be considered as such for the purpose of the action: and application being afterwards made to the Court for a new trial, a rule to shew cause was refused. He also referred to *Israel v. Douglas* (b), as establishing the same principle.

LAWRENCE J. That case has been since mentioned (c) in this court, and was not approved of upon that point; and *Wilson* J. expressed his dissent to it on that ground at the time. I have a note of the case which differs materially from that cited.

Lewis, in support of the rule, contended that an affidavit to hold to bail as for so much money paid for the use of the defendant could not be supported where no money had been actually paid, but only a security given for the debt. That the only authority for this was the case of *Barclay v. Gouch*, which passed at nisi prius; for upon what ground the new trial was afterwards applied for and refused does not appear. That the case of *Israel v. Douglas* was sustainable on another ground, on which only *Wilson* J. concurred with the other Judges. But that it had

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(a) 2 *Esplan. Ni. Pri. Cas.* 571. (b) 1 *H. Black.* 239.(c) *Qu. in Johnson v. Collins, ante*, 1 vol. 98.

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been long ago decided in *Nightingale v. Devisme* (a), and lately in *Jones v. Brinley* (b), that a contract for a specific thing like stock, or any other specific security, was not the same as money, and could not be recovered as such. That a liability to pay for another could not give the same cause of action as an actual payment on his account.

Lord ELLENBOROUGH Ch. J. (after consulting with the other Judges.) There is no pretence for considering the giving this new security as so much *money paid* for the defendant's use. Supposing even the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money.

Rule absolute.

(a) 5 Burr. 2592.

(b) *Ante*, 1 vol. 1.

Tuesday,
Nov. 17th.

Where by the dubious use of the word *family* (viz. brother and sister's family) in a will, the testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what persons he meant to apply it; the heir at law is entitled to take.

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DOR on the Demise of HAYTER against JOINVILLE and Others.

IN ejectment for certain premises situate in the county of *Hants*, tried before *Le Blanc* J. at the last assizes at *Winchester*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

A. Hayter, being seized in fee of the premises in question, of which the defendants were in possession, by will dated 22d of *December* 1781, and properly attested to pass real estate, devised the same as follows: "I give and bequeath unto my brother *Hayter*, and to his wife and * children, 40*l.* equally to be divided between them, share and share alike. Also I give and bequeath unto my brother-in-law *William Whitmarsh* and his children 40*l.*, to be equally divided between them, share and share alike. Also I give and bequeath unto my sister *Mary Cooper*, and to her husband and children 40*l.* equally to be divided between them, share and share alike. Also I give and bequeath unto *M. White*, daughter of *E. W.*, who now lives with me, 10*l.* All which said several and respective legacies I hereby order to be paid to the said several and respective legatees within three months next after my death. Also I give and bequeath unto the said *M. White*, the further sum of 60*l.*, payable and to be paid to her

after my wife's death, out of and from the half part and share of my estate and effects given and bequeathed to my wife as herein-after mentioned. And as to all the rest, residue, and remainder of my goods, chattels, estate, and effects, whatsoever and where-soever, both real and personal, I give, devise, and bequeath the same unto my beloved wife *Sarah Hayter*, for and during the term of her natural life; and from and after her death, then I give, devise, and bequeath the said rest and residue in manner following, (viz.) one half part thereof unto *my wife's family*, subject to the payment of the said sum of 60*l.* above mentioned; and the other remaining half part thereof unto *my brother and sister's family*, equally to be divided between them, share and share alike. And lastly, I do nominate, &c. my said wife *Sarah Hayter* full and sole executrix, &c. desiring *J. Grant*, of, &c. and *J. G.*, his son, of, &c. to be trustees of my will," &c. The testator died seized soon after, without ever having had any issue. The testator at the time of making his will and death had one brother, *Jos. Hayter*, the lessor of the plaintiff now living, who then had six children, two sons and four daughters, all now living. The testator had survived five other brothers, who died without issue. He had also one sister *Mary*, married to *Thomas Cooper*, which said *Mary* is now living, and at the time of the testator's making his will had six children, four sons and two daughters, all now living. *Jane*, another of the testator's sisters, married to *W. Whitmarsh*, died on the 16th of *December 1773*, in the testator's lifetime, leaving twelve children, seven sons and five daughters, all of whom were living at the death of the testator, and all but the eldest son *Timothy* are now living: *Timothy* has left three sons now living. *Joseph Hayter*, the lessor of the plaintiff, was the eldest brother of the testator, and now is, and at the time of the testator's death, was his heir at law. *Sarah Hayter*, the widow, entered into possession of the premises under the will, and enjoyed them till her death, which happened on the 2d of *November 1796*. *Sarah* never had any issue. She had, at the time of the testator's making his will and death, one brother *John Grant* of *M.*, mentioned in the said will, who had one son, *John Grant* of *H.*, also there mentioned, and a daughter *Jane*, the wife of *Thomas Alexander*. *John Grant* the elder died in the life-time of *Sarah Hayter*. *John Grant* the younger, his heir at law, is yet alive, and so is *Jane Alexander*, his daughter. The question for the opinion of the court was, Whether the lessor of

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the plaintiff were entitled to recover any and what part of the premises in question? If the Court were of opinion he was not entitled to any part, the verdict to be entered for the defendants. If the court thought him entitled to the whole, the verdict to stand: if to any part, the verdict to be entered for such part.

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This case was argued in last *Michaelmas* term by *Dampier* for the plaintiff, and *Burrough* contra. It is needless to detail the argument, which turned on the particular wording of a very perplexed will. With respect to the meaning of the word *family* as used in another will, the case of *Harland v. Trigg*, 1 *Bro. Chan. Rep.* 142. was cited, which is also referred to in *Newlan v. Nolligan*, *ib.* 491.

The Court, entertaining great doubt upon the construction of the will, took time to consider of their judgment. And now

GROSE J. delivered the opinion of the Court.

This case was argued when Lord *Kenyon* was Chief Justice, and has stood over longer than we should have permitted, in hopes that upon consideration we might be able to put a construction upon the will, consistent with some probable intention of the testator. But after very full and repeated consideration, we are not able, with any rational certainty, to discover what he meant. For the defendants, it was contended, that the meaning of the testator may be collected from referring to the former part, and that the several persons to whom legacies had been before given were to take the moiety of the estate not given to the wife's family, and that the wife's brother, and her nephew and niece, were the persons to take the other moiety. But the rule fails to shew what the testator meant by the word *family*: for there is no legacy given to his wife's brother, nephew, and niece, who, it is contended, are to take the moiety given to her family. And to this rule there is also this objection, that it introduces *Joseph Hayter's* family to divide with him, the brother, when the moiety of the estate is given to him, and to his sister's family, not to his and his sister's family; for the words are, "The other remaining half part thereof unto my brother and sister's family," not to my brother's and sister's family, referring the word *family* both to the one and the other. With this construction Lord *Kenyon* did not agree; but observing on the words charging 6*l.* in favour of *Mary White*, which direct that it shall be paid out of the half part and share of his estate and effects given and bequeathed to his WIFE, as thereinafter mentioned, he suggested that

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that possibly the difficulties in construing the will might be gotten rid of, if the testator, were considered as making his wife the PROPOSITA, through whom her family were to take; in which view of the case the brother and family of the sister would take in like manner. But we do not think that this construction can be adopted; for we think that the testator probably intended, that the words "SISTER'S FAMILY" should be applied to the family of *Jane Whitmarsh*, as well as to the family of *Mary Cooper*: and as *Jane Whitmarsh* died in his lifetime, and before the making of the will, he could not have intended that *Mary Cooper* should take as a PROPOSITA one-fourth of his estate, to the exclusion of those who, according to the meaning and understanding of the testator, were the family of his sister *Jane Whitmarsh*. For these reasons my Brothers *Lawrence* and *Le Blanc*, and myself, are of opinion that the devise is void for uncertainty, and that the lessor of the plaintiff, as heir at law, is entitled to recover the whole estate.

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HOULE against BAXTER.

Monday,
Nov. 29th.

IN an action on promises, the first count of the declaration stated that one *E. Capper*, on 22d September 1796, drew a bill of exchange upon the defendant for 25*l.* payable at three months after date to *Capper's* order, which *Capper* indorsed to the plaintiff, and the defendant accepted. The second count, after setting out the bill and acceptance, and the indorsement by *Capper* to the plaintiff, further stated an indorsement and delivery of the bill to one *W. Abud*, a presentment of it, when due, to the defendant for payment, and his refusal, whereupon the plaintiff was obliged to pay *Abud* the money. There was also a count for money paid, &c. and other common money counts. The defendant pleaded his bankruptcy on the 7th of November 1795, in the form prescribed by the stat. 5 Geo. 2. c. 30. s. 7. and at the trial at the sittings in London after Michaelmas term 40 Geo. 3.

Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant, the acceptor, who had himself no consideration at the time for such acceptance; and the day before the

bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff the indorser out of the hands of the indorsee; held that, the bill being proveable as a debt under the defendant's commission, and there being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant who had obtained his certificate.

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before Lord *Kenyon* C. J., a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

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The defendant before his bankruptcy kept a retail silver smith's shop, and dealt with *Capper*, the drawer of the bill, who was a working silversmith. On the 22d of *September* 1796 the defendant ordered a parcel of goods of *Capper*, and in order to enable him to raise silver to make up such goods the defendant accepted the bill of exchange mentioned in the declaration. *Capper* indorsed the bill; and the plaintiff at *Capper's* desire, though without the defendant's privity, indorsed it likewise, receiving no value or consideration whatever for so doing, but merely to give additional credit to the bill. The bill being thus drawn, accepted, and indorsed, *Capper* took it to one *Abud* a refiner, who on the credit of the bill delivered to *Capper* a part of the amount in silver, and gave him the rest in cash. This silver was afterwards manufactured by *Capper* into the goods ordered by the defendant, which were accordingly delivered to him. The defendant became a bankrupt on the 7th of *November* 1796, and has since obtained his certificate. On the 24th of *December* 1796, being the day before the bill became due, the plaintiff went to *Abud*, and took it up, paying him the amount. The question was, Whether the plaintiff were entitled to recover: if the Court should be of opinion that the plaintiff was so entitled, the verdict to stand; otherwise a nonsuit to be entered.

The case was argued in *Easter* term 40 *Geo.* 3.

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Jervis for the plaintiff. The question is, Whether the defendant's certificate be a bar to the plaintiff's recovering in this action? and that depends on another question, Whether or not the plaintiff could have proved this demand under the defendant's commission? There are three periods (the two first before the defendant's bankruptcy) which are material to be considered; and at neither of these could the plaintiff have recovered in an action against the defendant upon the bill of exchange as a mercantile instrument. First, The plaintiff could not have sustained such an action when he first lent his name as indorser; because there was not at that time any consideration or privity as between the plaintiff and defendant: it was a mere accommodation bill, known to be such by the plaintiff. Suppose, instead of returning it to *Capper*, the plaintiff had kept it in his hands, he could not have proved it under the defendant's commission, because that would have been in fraud of the purpose for which he received it. Secondly, Neither did any contract arise upon the

the bill between the present parties at the time when it was negotiated with *Abud*. It is true that *Abud* advanced the money upon the credit of the bill, for which the plaintiff was then liable as indorser, and that this was before the defendant's bankruptcy; and it may be contended that this was in substance a loan by the plaintiff to *Capper*, which created a contract between them on the bill; and that if *Capper* were liable to the plaintiff on the bill, the defendant was also necessarily liable. But whatever weight may be due to such an argument, since the doubt which has been thrown upon the case of *Brooks v. Rogers* (a), if the money had been actually advanced to the plaintiff as holder and indorser of the bill when it was negotiated, and by him paid over to the defendant; yet it cannot apply to this case where the plaintiff never was the holder of the bill; for he indorsed it while it was in the possession of *Capper*: the advance, therefore, by the the indorsee was not a loan to the plaintiff and by him to *Capper*, but by the indorsee to *Capper* in the first instance, and consequently no contract could arise upon the bill as between the plaintiff and the defendant in consequence of a transaction between two other persons, to which neither of these parties was privy. Then if no contract existed, as between these parties, upon the bill as a mercantile instrument before it became due, it follows, Thirdly, That none could arise upon it after it was taken up by the plaintiff, which was after the bankruptcy; because he could not be remitted to any right which had no pre-existence, according to the case of *Death v. Serwenters* (b). If then the plaintiff had no remedy upon the bill which would have enabled him to prove it under the defendant's commission, it follows that he may recover upon the count for money paid, &c. as for a new cause of action since the bankruptcy, and is not barred by the defendant's certificate. It is expressly stated, that the purpose of the plaintiff's lending his indorsement was in order to give the bill additional credit. This therefore resolves itself into the common case of principal and surety, where the latter has paid money for the former after his bankruptcy, in which case a new cause of action arises, there being no legal debt contracted before the bankruptcy, capable of being proved under the commission. *Chilton v. Whiffin* and another, 3 *Wils.* 13. *Young*

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(a) 1 *H. Blac.* 640. Vide *Cowley v. Dunlop*, 7 *Term Rep.* 645.(b) 1 *Lutw.* 888.

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v. *Hockley*, ib. 346. and 2 *Blac.* 839. *Venderbeyden v. De Paiba*, 3 *Wils.* 528. *Heskuyson v. Woodbridge*, B. R. M. 24 *Geo.* 3-*Dougl.* 165. n. Those were cases where the plaintiffs had accepted bills of exchange on promises of indemnity by the drawers, on which the latter were holden liable notwithstanding their subsequent bankruptcies and certificates. But there is no essential difference between the case of an acceptor and that of the drawer of an accommodation bill. It is true that no action can be maintained on the bill of exchange by the acceptor, because *as such* (a) he can never be a creditor; his acceptance importing the admission of a debt from him to the drawer; whereas an indorser may declare *as such* on the bill; his indorsement *prima facie* importing a consideration. This presumption however may be rebutted by shewing the fact; and here it is found that the plaintiff received no consideration for his indorsement. The case of *Howis v. Wiggins* (b) is directly in point. There it appeared that certain notes drawn by the defendant had been delivered by him before his bankruptcy to one *Green*, with the plaintiff's indorsement upon them; and that after the bankruptcy *Green* recovered against *Howis*, who thereupon sued *Wiggins* for the amount. The Court held that the defendant's certificate was no bar to the action. Mr. Justice *Grose*, speaking of the last-mentioned case in the subsequent case of *Cowley v. Dunlop* (c), says that the Court decided it on the ground of its being a case of indemnity; for that *Howis* was considered as having indorsed the notes as surety for the defendant, with a view to give them credit, and without any consideration for so doing: and that in no other view of the case could it be supported. That coincides precisely with the facts of the present case; and therefore as far as regards the application of that case to this, the authority of *Howis v. Wiggins* is confirmed.

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Marryat for the defendant. There are two questions to be considered; 1st, Whether the plaintiff can recover upon the first count as upon the bill of exchange? 2d, Whether the facts found disclose any collateral contract on which he can recover independently of the bill? In considering these questions two facts are material to be attended to; the one, that the indorsement by the plaintiff was made at *Capper's* request, and without the de-

(a) Vide *Cowley v. Dunlop*, 7 *Term Rep.* 576. *per Grose J.*

(b) 4 *Term Rep.* 714.

(c) 7 *Term Rep.* 577.

endant's

defendant's privity; which gets rid of all pretence of considering this as a case of principal and surety between these parties: the other material fact is, that the bill was taken up by the plaintiff while it was still in a course of negotiability; which shews that he was acting in his character of indorser, and thereby gave himself an interest in the bill as holder for a valuable consideration. Then the bill having been drawn before the bankruptcy of the defendant, it is immaterial whether the plaintiff so possessed himself of it before or after that event: for in either case it was proveable as a debt under the commission, and might even have been the foundation of the petitioning creditor's debt. *Ex parte Thomas* (a), *Anonym.* 2 *Willf.* 135. *Bingley v. Maddison* (b), and *Glaisher v. Hewer* (c): all which cases proceed on this principle, that an indorsement of a bill of exchange is as against the drawer or acceptor a transfer of the whole debt. And the case of *Francis v. Rucker* (d) extends the same doctrine to damages accruing after the bankruptcy upon the protest for non-payment. In the case of *Cowley v. Dunlop* (e) the Court were divided in opinion upon a question somewhat similar to the present. The facts there were shortly these: *A.* and *B.* exchanged acceptances, and each, having negotiated the respective bills, became bankrupts; and *B.*'s estate was afterwards obliged to pay a dividend as drawer on the bills accepted by *A.*, as well as to pay *B.*'s own acceptances. The question was, Whether *A.*'s certificate were a bar to an action brought against him by *B.*'s assignees for money paid to his use. In that case (f), though Lord *Kenyon* was of opinion with the plaintiff, nevertheless he admitted that if the bills drawn by *B.*, though once negotiated, had come back again to him, he would have been remitted to his better right, and might have proved his debt under the commission against *A.*: but as the bills were not in *B.*'s hands at that time, and were put in force against the estate of *A.* by the persons who had the legal right to them, *B.* could not prove the bills again under the same commission against *A.*; and therefore if *B.*'s assignees could not recover against *A.*, himself, they would be left without remedy. Now that reasoning is in favour of the defendant in the present case; because here the plaintiff, having

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(a) 1 *Atk.* 73. (b) *B. R. Mich. Term* 1783, *Cooke's Bank.* L. 13.
(c) 7 *Term Rep.* 498. (d) *Ambl.* 672.
(e) 7 *Term Rep.* 565. (f) *Ib.* 582.

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taken up the bill before it was due, was remitted to 'his better right as indorser, and might have proved it under the defendant's commission, no other person having proved the same debt as in the former case. Upon the whole, therefore, that case is in point for the defendant. Then if the plaintiff could have proved his demand on the bill under the defendant's commission, he cannot recover on any collateral implied undertaking; for such an implication can only arise in default of an express contract. As in *Toussaint v. Martinant* (a), where a surety, having become bound with his principal for payment of money by instalments, took a bond from the principal conditioned for payment of the whole amount before the first instalment was due. Then, the surety having been obliged to pay the first instalment after the bankruptcy and certificate of the principal, the Court held that he could not maintain an action against the principal as for money paid to his use after the bankruptcy; but that, being possessed of a legal security proveable under the commission, he could only resort to the bankrupt's estate. The same rule was laid down in *Rolfe v. Caslon* (b), where counter bills of accommodation were given. The cases of *Howis v. Wiggins* (c) and *Brooks v. Rogers* (d) are at all events distinguishable from the present; for in each the plaintiff had contracted the responsibility at the defendant's desire, from whence a promise of indemnity was implied. Also in *Howis v. Wiggins* no money was advanced by the plaintiff for the note before it became due, but only a responsibility created; therefore there was no consideration in fact whereon the plaintiff could have maintained an action on the note against the defendant the maker. Here the plaintiff did not indorse the bill at the defendant's instance; and the defendant, having received a consideration for his acceptance, was bound to any holder of the bill; and the plaintiff as holder might have maintained an action on the bill itself, even when he first indorsed it, but at all events when he afterwards took it up while it remained in a state of negotiability. *Capper* might certainly have enforced payment in an action on the bill; and the plaintiff stood on the same right as *Capper*, at whose request he had indorsed it. So the plaintiff's second possession of the bill was founded on the right of *Abud*, to whom he had paid valuable

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(a) 2 Term Rep. 109.
(c) 4 Term Rep. 714.

(b) 2 H. Blac. 570.
(d) 1 H. Blac. 640.

consideration; and if *Abud* must have proved it under the defendant's commission, provided it had remained in his hands, so must the plaintiff. It is also found in the case that there was no privity between these parties, without which no contract can arise. Besides, at any rate it was an officious and voluntary payment by the plaintiff, out of which no debt can arise.

Jervis in reply. It does not lie in the defendant's mouth to allege want of privity in law; because the bill was originally drawn for his benefit, and he received the consideration, and the plaintiff became responsible at the request of one who was acting in concert with the defendant. Neither does it follow that because *Abud* had a remedy on the bill that the plaintiff had one also; for *Abud* was no party to the original contrivance, whereas the plaintiff had full knowledge that it was only an accommodation bill. The plaintiff had no claim upon the defendant till he was actually damaged, which was not till after the bankruptcy. This was not a voluntary payment of the debt of another by the plaintiff; but made on account of his prior liability as indorser; and *Abud* might have enforced payment of the bill against him. And in fact the bill was not taken up before it was due, for *Christmas-day* intervening, made it necessary to be taken up at that time (a).

Curia advisare vult.

GROSE J. now delivered the opinion of the Court (b):

This was a case reserved at the sittings at *Guildhall* before Lord *Kenyon*. The declaration contained several counts. In the first the plaintiff declared as indorsee of a bill of exchange against the defendant as acceptor. In the second he stated that the plaintiff had indorsed the bill over to *Abud*; that the defendant, on its being presented to him for payment, had refused to pay it; whereupon the plaintiff had been called upon by *Abud*, and had been obliged to pay him the sum specified in the bill. These are the most material counts; the others are for money paid by the plaintiff to the defendant's use, and the other common counts. The defendant pleaded his bankruptcy on the 7th of *November* 1796, and his certificate; and that the cause of action accrued before the bankruptcy. The facts were, that

(a) Vide *Taffel v. Lewis*, 1 *Ld. Ray.* 743.

(b) The case was argued while Lord *Kenyon* presided in the court.

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the defendant, a silversmith, having ordered goods to be manufactured for him by one *Capper*, in order to enable *Capper* to buy the materials, accepted a bill of exchange, drawn on him by *Capper*, dated 22d of *September* 1796, at three months after date. *Capper* indorsed it; and at *Capper*'s desire, but without the DEFENDANT'S PRIVACY, the plaintiff indorsed it to give it additional credit, and without receiving any consideration for so doing. *Capper* then took the bill to *Abud*, who paid him the value of it, part in silver and the rest in cash; on which *Capper* manufactured the goods and delivered them to the defendant. The defendant became bankrupt the day before the bill became due; on which the plaintiff took up the bill that day from *Abud*, and it never was proved under the commission. Now here the plaintiff contracted no liability at the defendant's request. He never became surety for him in this transaction. His demand against the defendant, the acceptor, arises solely upon the bill, and there was nothing to prevent his proving it under the commission. We are therefore of opinion that the defendant's bankruptcy is a bar to this action, and consequently that there ought to be judgment for the defendant.

Judgment of nonsuit to be entered.

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The KING against TAPPENDEN.

A by-law altering the qualification of persons to be taken as apprentices by the members of a corporation, in order to acquire their

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freedom by a certain servitude, is not

warranted by a custom in such body, which claimed by prescription to make by-laws regulating the number of persons to be taken as apprentices.

A WRIT of mandamus was directed to the defendant, 'as steward of the manor and hundred of *Faversham*, in the county of *Kent*; reciting that the town and port of *Faversham*, from time immemorial, was an ancient port, and that there was and still is an ancient company or corporation called The Company of Free Fishermen and Dredgermen of the Manor and Hundred; and that from time immemorial, every person who hath served an apprenticeship of seven years under indentures of apprenticeship to a freeman of the company to learn the trade of a fisherman and dredgerman, and whose indentures have been duly enrolled in the books of the company, and who was a married man at the time of his admission, has been entitled to be admitted

to his freedom. And that from time immemorial it has been the custom for every freeman, as it seemed convenient to him, to take apprentices; and that during all that time it has been usual and customary to enrol the indentures of every apprentice so bound, and was the duty of the steward to enrol the same upon tender of such indentures. It then proceeded to state that one *J. Fairbrass* was, by indentures dated 11th *October* last, bound apprentice to one *T. Fairbrass*, then and still being a freeman of the company, and entitled to take such apprentice, for seven years, to learn the trade of such fisherman, &c. and that his indentures were tendered to and refused to be enrolled by the defendant as steward, &c. wherefore he was commanded to enrol them, &c.

To this the defendant returned that the tenants of the said manor and hundred from time immemorial have been and are an ancient company, known by the name, &c. and during all that time have holden of the lord of the said manor and hundred, as tenants of the manor, &c. certain *oyster grounds* within and belonging to the said manor, &c. and have laid and kept oysters upon the said grounds *for the common use and benefit of the freemen of the said company*, and have carried on and exercised, for the common use and benefit of the said freemen, *a trade in oysters in partnership together*; and that the said trade is the chief business and employment of the company, and the principal object for which they act as such; and that the profits of the said trade *are divided among the freemen*. And that from time immemorial there have been certain courts called Water Courts, holden from time to time in and for the manor, &c. at which the company have been used and accustomed to make orders and ordinances, as well for the better government and regulation of the said trade, *and the restraining the number of persons to be admitted to the freedom of the company, as for the reasonable restraining and regulating the number of persons to be taking apprentices by any of the freemen, so as to entitle such persons by reason of such apprenticeship to be admitted to the freedom of the company*. That on the 30th of *July* 1785, at a water court holden, &c. an order was made by the company, that from thenceforth no tenant of the manor, &c. should take any apprentice or apprentices, other than his own son or sons, or the son or sons of his wife by any former husband or other than the son or sons of any other tenant of the manor, &c. or of his wife by any former husband; and that any indenture of apprenticeship made contrary thereto should not be enrolled,

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rolled, nor the apprentice admitted to his freedom. The return then stated that that order was still in force, and that at the time of making it, it was necessary, for the well-being of the company, to make some regulation for restraining the number of persons to be admitted to their freedom; and that unless some regulation for that purpose had been made, the number of freemen might have become and was likely to become so large, that there was great reason to believe that they and their families could not have been supported by the profits of the trade, and that the said oyster fishery must have fallen very much to decay. It then negatived that *J. Fairbrass* was the son either of the said *T. Fairbrass* or of any woman who is or was the wife of the said *T. F.*, or that he was the son of any person who is or was a tenant of the manor, &c., or of any woman who is or was the wife of any tenant. Wherefore the defendant had not inrolled the said indentures, &c. In *Michaelmas* term last.

Wood took these objections to the return; 1st, That the by-law therein stated, of the 30th of *July* 1785, was repugnant to the original constitution of the company, which laid no such restraint on the number or condition of the apprentices to be taken by the freemen, and was therefore void. 2dly, That it was also void, as contrary to the freedom of trade in general. 1st, The company being immemorial must be presumed to have originated by charter, regulating the admission of apprentices to freemen in the manner heretofore always exercised. By the original constitution every freeman has a right to take any person as an apprentice, whose indentures the steward is bound to inrol, provided he has served seven years under them, and was a married man at the time of his admission. The by-law, however, attempts to impose another qualification or condition, namely, that the apprentice should be the son of a freeman or of a widow afterwards married to a freeman. The object of the crown in originally framing this institution was to create a nursery of seamen, to which the new restraint imposed by the by-law is repugnant, inasmuch as it tends to diminish the number of persons capable of serving the public in that capacity: and in fact the number of seamen annually supplied to the navy since the new regulation is very considerably diminished. 2dly, The by-law is contrary to the general freedom of trade. Upon this principle a by-law made by the wardens of the coopers' company of *Newcastle-upon-Tyne* (a)

(a) 7 Term Rep. 543.

to restrain the number of apprentices to be taken by the members of it was holden to be void.

Bayley Serjt., contra, said that the by-law in question did not pretend to restrain the taking of apprentices by the freemen generally; but only prevented such apprentices from acquiring their freedom, unless they came within the description of the by-law. [Lord *Kenyon* C. J. If the constitution of the place originally conferred certain rights on apprentices serving freemen of the company, can the Company by a by-law take away those privileges? You will find it difficult to maintain that proposition: Suppose none of the immediate tenants of the manor had any children, is the Company to die a natural death for want of other successors?] That would be as good a reason for repealing the by-law as the superfluity of members was for enacting it. [Lord *Kenyon*. That would depend upon their pleasure, which shews that the by-law is *felo-de-se*.] If the number of freemen had not been restrained, the company would have become so numerous that the profits of the trade would have been inadequate to their maintenance, and so the object of the institution would be lost. This corporation is of a peculiar kind: the members of it are partners in trade, which must from the nature of the thing be limited to the particular oyster grounds within the manor. They cannot carry on a general unlimited trade. Then if the trade be in its nature limited, it is not an unreasonable by-law which limits the number or description of persons to carry it on. Having then a power in their original creation to make by-laws and ordinances, it is reasonable to presume that they had a power of making so reasonable a by-law as this, which adapts the number of traders to the extent of the trade which was the object of the incorporation. It may be another question if they abuse this power to the probable destruction of the corporation. If this power be part of the custom, it gets rid of the authority of the case cited, where there was no such custom.

Wood, in reply, observed that the by-law was not consistent even with the custom pleaded, supposing such a custom to be good. For the custom stated is to restrain the *number* of apprentices, which will not warrant a by-law altering the *qualification* of such, which is a very different sort of restraint, and may operate to reduce the numbers much more than may be necessary or within the contemplation of the makers of it.

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Lord KENYON Ch. J. then said, that, the Court would advise further of the case, if, upon consideration, they found there was any difficulty in it. But, as then advised, it seemed to him difficult to maintain the by-law. That the argument last urged by Mr. *Wood* had great weight in a case which came before the court from *Maidstone*, where it was attempted, but without effect, to add the qualification of having 10*l.* a year to persons eligible to a certain office in a corporation. There might certainly be reasonable restraints imposed by by-laws on trade: but he thought this by-law bad, inasmuch as it attempted to add a qualification to the persons before eligible to be taken as apprentices, beyond what the original constitution had required.

GROSE J. also observed that this by-law operated as an alteration of the qualification of persons to be taken as apprentices, and was not merely an abridgement of the number of them.

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The case stood over, without further notice from the Court, till the parties applied again on a former day in this term, to know whether they had disposed of the rule. And on this day

GROSE J. delivered the opinion of the Court (*a*), which, he observed, had stood over thus long by mistake; as the rule for a peremptory mandamus was granted *nisi* (*b*), &c. at the time it was argued; the Court being of opinion that the by-law was bad, as being a restriction of the qualification under the custom.

Rule absolute.

(*a*) The case was argued and stood over for consideration before Lord *Ellenborough* took his seat on the bench.

(*b*) *i. e.* to take effect if the Court do not alter their opinion in the course of the same term.

WILLIAMS *against* The EAST INDIA COMPANY.

THE declaration contained four counts, the first of which was abandoned. The second stated that the plaintiff, before and at the time of making the charter-party of affreightment after-mentioned, and from thence continually afterwards until the committing the grievance and happening of the loss after-mentioned, was the owner of a ship called the *Princess Amelia*, whereof one *J. Ramsden*, for and during all the time aforesaid, was master; which said ship, at the time of making the said charter-party, was at anchor in the river *Thames*. That the plaintiff, on the 14th of *February* 1797, by a certain charter-party made between him, &c. and *Ramsden*, as captain of the ship of the one part, and the *East India Company* of the other part, let her to freight to the Company; (in which charter-party was a covenant for the owners to receive and take on board the ship, and well and securely stow and place therein, all such goods, &c. as should be laden or tendered to be laden on board by the order of the Company or their servants, &c.) That the ship sailed under such charter-party on the 20th of *July* 1797 to the *East Indies* on her voyage, and duly discharged her outward-bound cargo, and remained in the Company's service in the *East Indies*, by virtue of the said charter-party, until and at the time of the committing of the grievance and happening of the loss after-mentioned. Yet the Company, by their agents, while the ship so remained in their service, &c. *wrongfully, unlawfully, and unjustly*, sent, and caused and procured to be sent, amongst other goods and merchandize, to and on board the said ship or vessel, for the purpose of being conveyed therein from *Bombay* in the *East Indies* to *Tellicherry*, a certain package, containing therein certain oil and varnish of a combustible and inflammable nature, without giving due or sufficient notice or intimation thereof to the said *J. Ramsden*, so being master of the said ship, or to any

which a loss happened) without due notice to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship (which first mate was dead, and no other person was present to depose to the conversation which passed between them); held that the best evidence of the fact could only be given by the defendants' officer who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence.

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Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act

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is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity (by

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other person or persons concerned or employed in the navigation thereof, as the said defendants ought to have done, in order that the said *Ramsden*, or such person or persons concerned or employed as last aforesaid, might stow and deposit the said last-mentioned package in such part of the said last-mentioned ship, as not to endanger the safety and security of the same in the conveyance of the said package. That by reason of such notice or intimation not having been given, the said package was not placed and stowed in manner aforesaid, but was placed in the afterhold of the ship, for the purpose of being conveyed as aforesaid, the same being an unfit and unsafe part of the ship for the stowing the said package, and the safety of the ship being greatly and unnecessarily endangered by the conveyance of the package in that part. That afterwards, on the 1st of *April* 1798, the ship sailed under the Company's orders, with the said package on board, from *Bombay* to *Tellicherry*; and that in the course of that voyage, on the 5th of *April*, on the high seas, the said oil or varnish, by reason of its own inflammable and combustible nature, set fire to the ship; and the same, with her cargo, by reason of the said package of oil or varnish being so placed in the afterhold, for want of such due notice or intimation, as aforesaid, was burned and destroyed, &c. to the plaintiff's damage of 20,000*l.* The third count was to the same effect. The fourth count stated more generally, that the Company so *carelessly, negligently, and improperly* used the said ship whilst she continued in their employ, that through the carelessness, negligence, and improper conduct of them and their agents employed in that behalf, the ship was burned and destroyed.

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Upon not guilty pleaded, at the trial before Lord *Ellenborough* Ch. J., at *Guildhall*, it appeared that the commodity which had occasioned the loss of the ship by fire, was a jar of a certain oil or varnish called by the natives in *India*, *Roghan*, packed in a wicker case, and supposed to be a composition of gum-gopal and linseed oil, of a very inflammable nature. This was put on board by order of the military board at *Bombay*, amongst a quantity of other military stores; and in the written order to receive this package on board it was simply called *Roghan*, without any specification of its nature. It appeared to be the duty of the conductor of the military stores, on the part of the Company, to carry them on board, and the duty of the chief mate of the ship principally to receive the cargo and stow it in the ship. On this occasion

occasion the evidence went to shew that the chief mate was the person who had received the *Roghan*, with other military stores, on board; but he being dead, no evidence was given of what passed between him and the conductor of the military stores or whatever other person had been in fact employed to convey the article on board. It was proved, however, by the captain of the ship and the second mate, that no communication had been made to either of them, or, to their knowledge, to any other person on board the ship, concerning the inflammable nature of the article called *Roghan*; that they themselves were altogether unacquainted either with the nature or even the name of it; and indeed it appeared evident enough from the whole of the testimony of these and other persons on board the ship at the time, that neither the nature nor the name of it were generally known. It was also proved that the chief mate was an officer of skill and discretion. That the after-hold where this *Roghan* was stowed was a proper place for such a package, if it were not known to contain an inflammable substance, but an improper place to stow an article of such a nature as this really was; and that by means of its oozing out of the jar, the ship was set on fire and totally destroyed soon after putting to sea.

Lord ELLENBOROUGH Ch. J. was of opinion at the trial that the plaintiff had failed in proving a material allegation in the declaration, and which it was material to him to prove, in order to support the action; namely, that no notice was given to the chief mate of the dangerous nature of the commodity at the time when it was received by him on board from the Company's officer: for non constat but that the fullest notice had been given. That the proof of this allegation lay on the plaintiff, and the best evidence of it was still in his power to produce, notwithstanding the death of the chief mate, by calling the Company's officer who delivered the article on board, who could best tell whether or not he had given such notice, as no other person appeared to have been privy to what passed between them at the time: and for want of this evidence he nonsuited the plaintiff.

Adam, Wood, and Bosanquet, on a former day shewed cause against a rule nisi, which had been obtained for setting aside the nonsuit and granting a new trial. Supposing it to have been the duty of the Company's officer to give notice of the dangerous nature of the commodity when it was delivered on board the plaintiff's ship, it must be presumed, in the absence of all proof to the

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the contrary, that such notice was given, as it cannot be presumed that the officer acted contrary to his duty. It was therefore a necessary part of the plaintiff's case to shew that no such notice had been given, that being the gist of the action, the wrong complained of, without which the action cannot be sustained, being *damnum sine injuriâ*. Com. Dig. *action on the case*. A. But at any rate, the plaintiff having averred the want of such notice in his declaration, and made it the foundation of his complaint, it was incumbent on him to prove it; the subject matter of the allegation, though conveying a negative in terms, being capable of affirmative proof, by calling either of the persons by or to whom the commodity was delivered on board, or any other who might happen to have been present at the time, to speak to what passed on the occasion. And the chief mate who received the *Ragban* being dead, the plaintiff ought to have called the officer as a witness by whom the delivery was made, who was capable of saying with certainty whether he had given such notice.

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Erskine, Dallas, and Williams, in support of the rule, contended that, this being a negative averment on the part of the plaintiff, the affirmative of which was the ground of defence to the action, it lay upon the defendant, whose duty it was to give the notice, to prove affirmatively that it was in fact given. The general rule is, that the party on whom the affirmative of the issue lies is to begin by proving it. Now upon the plea of not guilty to an action on the case, which puts in issue every material fact, the same rule must prevail. If, instead of the general issue, the form of pleading required the defendants to plead specially, they must have proceeded to aver, amongst other things, that they had given due notice of the dangerous nature of the commodity, and issue would have been specifically joined on that fact, which it would then have been incumbent upon them to prove, according to the general rule above-mentioned. Then the form of the pleading cannot vary the course of the proof. It often happens that a fact, which is the proper subject matter of defence to a defendant, and the affirmative of which it is incumbent upon him to prove, must yet be negatived by averment in the plaintiff's declaration; as in actions for penalties on the game laws, where the want of the several qualifications, mentioned in the enacting clause of the statute giving the penalty, must be averred in the declaration: and yet it was never required of a plaintiff to prove such

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negative averments (*a*), not being facts presumed to be within his own knowledge; but the practice has always been to throw the onus probandi on the defendant who insists on the affirmative. But at any rate there was sufficient evidence of the negative given by the plaintiff to leave to the jury, whose proper province it was to decide upon it. For the averment is, that no notice of the dangerous nature of the commodity was given to *J. Ramsden* the master, or any other person employed in the navigation of the ship; and it was proved by Captain *Ramsden*, and the next surviving officer of the ship, who had the principal conduct of her, that no notice had been received by them, which was at least sufficient to throw the onus probandi on the defendant, that notice had been given to the chief mate who was dead. Besides, it might also be considered as some evidence of the negative, that the chief mate, who was an officer of skill, had stowed the package in a situation which no person, knowing the dangerous nature of its contents, would, without the grossest ignorance of his duty, have done.

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Lord ELLENBOROUGH Ch. J. now delivered the opinion of the Court. (After stating the case, and that the plaintiff was nonsuited at the trial, on account of his not having proved that no notice or information of the dangerous quality of the article put on board was given to the persons concerned or employed in the navigation of the ship :) It has been contended that the nonsuit should be set aside on two grounds; first, that the allegation of its being being sent on board *without notice* is the allegation of a negative, and that therefore the proof of the affirmative, viz. that it was sent on board *with notice*, should come on the other side, that is, on the part of the defendant. Secondly, It has been contended, that supposing the burthen of proving that the article called *Rogban* was sent on board in this case without notice should, in point of law, rest upon the plaintiff, yet that the plaintiff has in this case given sufficient *prima facie* evidence

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(a) Vide *Rex v. Stone*, ante; 1 vol. 639. 651, 3, 5.

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of the want of notice to have gone to a jury. As to the first point, namely, that the burthen of proof rested in this case on the defendant, and that he was bound to prove the fact of notice; it was argued by the plaintiff, that if, instead of pleading the general issue, the defendants had by their plea specially denied the several facts alleged in the plaintiff's declaration, that in pleading the defendants must, in the denial of the allegation that the Roghan was put on board without notice, have been obliged to allege affirmatively, *that they had given notice, or that the plaintiff had notice.* Now admitting that such would have been the form of the plea and issue, yet there is a rule of law by which, even in such case, and upon an issue so framed, the burthen of negating in proof such affirmative allegation of the defendants would have been thrown on the plaintiff; and that rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case of proving a negative, on the other side. *Monke v. Butler*, 1 *Rel. Rep.* 83. "In a suit for tithes in the spiritual court, the defendant pleaded, that the plaintiff had *not* read the XXXIX Articles; and the Court put the defendant to prove it, though a negative. Whereupon he moved the Court for a prohibition; which was denied: for in this case the law will presume that a parson had read the Articles: for otherwise he is to lose his benefice: and *when the law presumes the affirmative, then the negative is to be proved.*" This, it will be observed, was in a civil suit. So upon the same principle in Lord *Halifax's* case, *Bull. N. P.* 298, and also in *Viner*, tit. *Evidence*; upon an information against Lord *Halifax* for refusing to deliver up the rolls of the auditor of the Court of Exchequer, the Court of Exchequer put the plaintiff upon proving the negative, viz. that he did not deliver them: for "*a person shall be presumed duly to execute his office until the contrary appear.*" And also in *The King v. Coombs*, *Comb.* 57. the defendant swore an affirmative; and an information was exhibited against him for it. And although a negative could not be proved, yet the Court directed that *they*; that is to say the prosecutors, should *first give their probable evidence*, and that the defendant should afterwards prove the affirmative if he could

could. And the same principle is recognized in *Gilbert's Law of Evidence*, p. 148. viz. that *where the law supposes the matter contained in the issue*, there the opposite party, (that is, the party who contends for the contrary of that which the law supposes,) must be put into proof of it *by a negative*. That the declaration, in imputing to the defendants the having *wrongfully* put on board a ship, *without notice* to those concerned in the management of the ship, an article of an highly *dangerous combustible nature*, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board *WRONGFUL*, the defendants must be conscious of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least. We are therefore of opinion, upon the principle and the authorities above stated, that the burthen of proving that the dangerous article in question was put on board without notice, rested upon the plaintiff, alleging it to have been wrongfully put on board without notice of its nature and quality. The next question is, Whether the plaintiff have given sufficient *prima facie* evidence of the want of notice to have gone to a jury? And we are of opinion that he has not. The best evidence should have been given of which the nature of the thing was capable. The best evidence was to have been had by calling in the first instance upon the persons immediately and officially employed in the delivery and in the receiving the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor on the other. And though the one of these persons, the mate, was dead, it did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, viz. the presumption and inference arising from a non-communication to other persons on board, as long as the military conductor, the other living witness immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to: and no impossibility of resorting to this evidence of the military conductor, the proper and primary evi-

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dence on the subject, is suggested to exist in this case. We are therefore of opinion that the nonsuit was proper, and that the rule for setting it aside must be discharged.

Rule discharged.

SCAMMELL

1803.

SCAMMELL and Others *against* WILKINSON and Another.Monday,
Nov. 29th

PROHIBITION having been granted in this case after demurrer and argument, (quod vide ante, 2 vol. 552.) a rule nisi was obtained on the part of the plaintiffs in prohibition to refer it to the master to tax their costs.

No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer upon a question, Whether they were entitled to a *general* or *limited* probate?

T. Carr, in support of the rule, referred to the stat. 8 & 9 Will. 3. c. 11. s. 3. which enacts "That in all suits upon any writ or writs of *scire facias* and suits upon *prohibitions*, the plaintiff obtaining judgment or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit," &c. He also noticed the 5th clause, which provides "that nothing herein contained shall be construed to alter the laws in being as to executors or administrators in such cases where they are not at present liable to the payment of costs of suit." But observed that the statute regulated costs in other cases than *prohibition*, to which the proviso would apply; and that it could not relate to cases in *prohibition*, costs being for the first time granted in this respect by the statute of *William* itself. He observed that there was no case deciding the construction of the third clause with respect to prohibition, the case of *Bellew v. Aylmer* (a) (to which he was referred by the Court as in point upon the general construction of the clause) being in *scire facias* against an executor, where this point passed without much notice and no argument; the attention of the Court being wholly directed to another question, Whether, admitting the judgment for costs to be wrong, the judgment must be reversed in toto; which they decided in the negative. The only other case on the subject is *Smith v. Harmer* (b), which is a short loose note. But 2dly, It does not appear that the defendants were sued *as executors*: That was not the question before this Court, which cannot take notice of them in that character without the authentication of the probate, which was

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(a) 1 *Str.* 188.(b) 1 *Lill. Pr. Reg.* 475, (G), referred to in *Hullock on Costs*, 303.

not

1802. not shewn to them. And non constat, that the defendants would finally be entitled to probate at all from the ecclesiastical court.
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Lord ELLENBOROUGH C. J. The question of costs in cases in scire facias and prohibition must stand on the same footing upon the construction of the third clause in the statute of King *William*, which provides for them both in the same terms. The case therefore of *Bellev v. Aylmer* is directly in point, that no costs can be awarded against these defendants, who are sued as executors in prohibition. That case was argued by very able counsel, and this point was thought too plain to be contested, and the judgment of the Court necessarily proceeded upon it. On the other point there was no doubt but that the defendants were sued *as executors*: it was not disputed but that they were entitled to a probate of some sort: the only question was, whether they were entitled to a *general* or *limited* probate.

Per Curiam,

Rule discharged.

Wigley was to have argued against the rule.

1802.

Monday,
Nov. 29th.WOOD *against* MILLER.

THE proceedings were by bill. The declaration was of *Hilary* term, and plea of non assumpsit of the same term. A rule to reply was given in *Easter* term, when the plaintiff replied the similiter ; and in *Trinity* term following, on a rule to enter the issue, it was entered by the plaintiff, entitling it of *Hilary* term preceding ; after which the defendant signed judgment of non pros for not entering the issue.

Marryat now shewed cause against a rule obtained for setting aside the non pros ; contending that the issue ought to have been entered of *Easter* term, being that wherein it was joined ; and that the entering it of another term was a nullity, and therefore the non pros was regular.

Rafe, in support of the rule, insisted that it was properly entered as of *Hilary* term, being the term of the plea pleaded ; and referred to *Wymark's* case (a), where it is said that the replication, rejoinder, &c. shall be intended to be pleaded in the same term as the plea. But

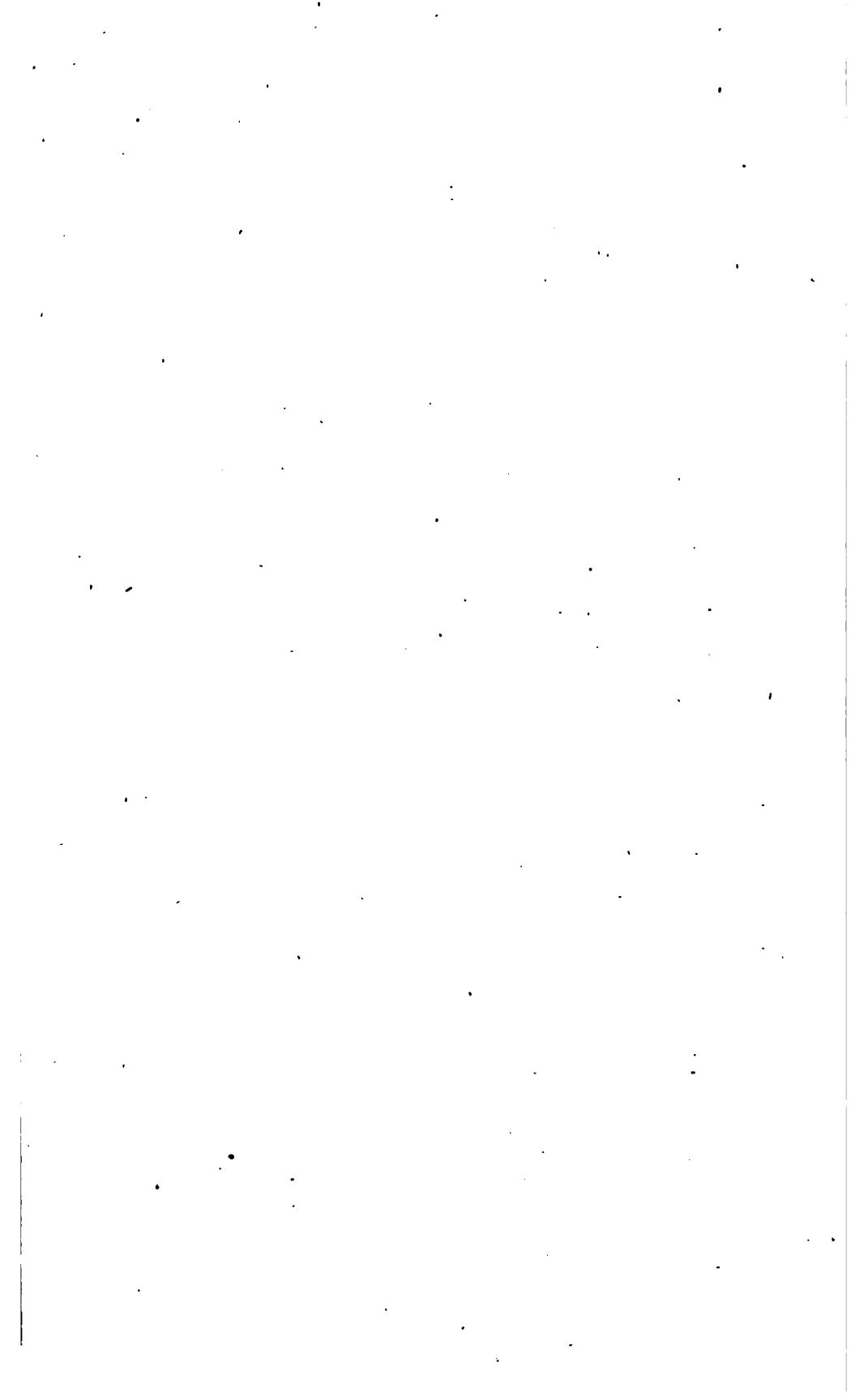
The Court (after consulting the Master) held that the issue ought to have been entered as of *Easter* and not of *Hilary* term, and therefore that the judgment of non pros was regular.

Rule discharged (b).

(a) 5 Co. 75.

(b) Vide *Tidd's Prac.* 2 vol. 649. which states the practice to be as here decided, but no authority is cited.

END OF MICHAELMAS TERM.



C A S E S

ARGUED AND DETERMINED

1803.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Forty-third Year of the Reign of GEORGE III.

WARREN qui tam, &c. against WM. and CHARLES WINDLE.

Tuesday,
Jan. 25th.

THIS was an action to recover a penalty of 50*l.* on the stat. 3 *Geo.* 2. c. 26. *f.* 13. which enacts "That all dealers in
" and sellers of coals by the chaldron or lesser quantity, within
" *London* and *Westminster* or within ten miles round the same,
" shall constantly keep and use, at their respective wharfs, ware-
" houses, and other places for the sale of their coals, a lawful
" *bushel*, such as is described by the statute 12 *Ann.* (st. 2. c. 17.
" s. 11.) with which bushel all such dealers in and sellers of
" coals shall justly measure, or cause all the coals they shall
" [206] so sell by the chaldron or lesser quantity to be measured,
" and shall put three bushels of coals so justly measured into
" each sack before described, which said sacks they shall use and
" no other for the carriage of such coals to the buyers thereof:
" and that all such dealers in and sellers of coals within the
In *March* 1802 the stat. 3 *G.* 2. c. 26. *f.* 13. giving a penalty against dealers in coals within the metropolis and 10 miles round for not justly measuring coals sold by the chaldron according to the lawful bushel directed by the st. 12 *Ann.* st. 2. c. 17. *f.* 11. was a subsisting law; and held that evidence of such coals proving short upon re-measurement was admissible to prove the charge of their not having been justly measured. *Qu.* Whether the stat. 3 *Geo.* 2. c. 26. were a subsisting law after *July* 1802, when the stat. 26 *Geo.* 3. c. 104. was revived by the stat. 42 *Geo.* 3. c. 89. ? Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the Legislature to that effect be expressed.

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" said limits who shall not constantly keep and use such a
" bushel and such sacks as hereinbefore described and no other,
" or shall not so fill their coal sacks from such bushels, or shall
" otherwise offend against the true intent and meaning of this
" act, shall for every such offence forfeit the sum of 50*l*." &c.

The second count of the declaration, on which the question arose, stated that the defendants, within six calendar months before, &c. on, &c. being dealers in and sellers of coals by the chaldron and lesser quantities within ten miles round the cities of *London* and *Westminster*, to wit, in the parish of *St. Clement Danes*, &c. did there sell and deliver to *W. B.* by the chaldron a certain quantity of coals as and for two chaldron and half a chaldron of coals, and then and there deliver the same to *W. B.* as and for two chaldron and an half, &c. Nevertheless the defendants *did not justly measure* or cause the said last-mentioned coals so sold and delivered to be justly measured *with a lawful bushel*; to wit, *such a bushel as was and is described by the stat. 12 Ann.* &c. according to the form of the statute, &c. but omitted and neglected so to do, &c. contrary to the form of the statute, &c. whereby and by force of the statute, &c. the defendants have forfeited 50*l*. &c.

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At the trial before Lord *Ellenborough* at the Sittings at *Westminster* after last *Trinity* term, it was proved that two chaldron and an half of coals had, on the 2d of *March* 1802, been ordered by *W. B.* of the defendants, who were coal-merchants, and that the same had been paid for as such, and were to be sent to *Hatton Garden*. A witness proved that he saw the coals delivered out of the barge into the cart, but saw no bushel used, and that he continued with the cart till the coals were brought to *Hatton Garden*, where they were re-measured with the defendant's bushel out of the cart, and the 29 sacks in which they were conveyed were found to contain 10 bushels short, being only 87 instead of 97 bushels. The plaintiff obtained a verdict for 50*l*. on the second count of the declaration.

Erskine and *Harrison*, in the last term, moved to set aside the verdict; first, on the ground that the evidence did not sustain the second count, which charged the defendants with not having measured the coals with the bushel required by the statute of *Queen Anne*; for *non constat* that they had not been measured in the first instance, though upon re-measurement they were found to be deficient.

Lord

Lord ELLENBOROUGH C. J. That argument excludes the word *justly*, which is in the statute as well as in the count describing the offence. It was satisfactory evidence for the jury to find that the coals had not been "*justly measured*." Besides, there was the evidence of the man who saw the coals delivered out of the barge into the cart, without observing any bushel used, and who continued with them till they were re-measured.

On this ground the Court were not inclined to grant a rule to shew cause: but the defendants' counsel next objected, that by the subsequent statute of the 26 Geo. 3. c. 108. s. 20. a different and greater penalty is imposed upon the seller, viz. a forfeiture of the coals and 5*l.* for every bushel deficient, in cases where coals re-measured are found deficient, and that the re-measurement being directed to be by a different measure than that described in the statute of *Anne*, it of course operated as a virtual repeal of the stat. 3 Geo. 2. on which the action was founded. Or if not, yet the giving short measure being by the latter act made a distinct and substantive offence, the fact ought not to have been received as evidence of another offence; namely, the not having measured them in the first instance; otherwise the defendants would be liable to be punished twice for the same act, although the stat. 26 Geo. 3. c. 108. provides (s. 22.) that no dealer in coals shall for any offences under that act be subject to any other penalty than is thereby inflicted, any thing in the stat. 3 Geo. 2. or in any other law to the contrary notwithstanding. And they remarked that the stat. 26 Geo. 3. was intitled "An act for explaining, amending, and reducing into one act of parliament the several acts passed for more effectually preventing the frauds and abuses committed in the admeasurement of coals" within the limits in question; and that s. 5. substitutes a different mode of admeasurement than that pointed out by the statute of *Anne*, referred to as the standard in the stat. 3 Geo. 2.; namely, "that all coals which shall be sold as wharf measure (the measure by which the coals in question were sold as contradistinguished from *Pool* measure) at any place within the limits of the act, shall be measured in the presence of the said labouring coal-meters *in such manner as is directed by the stat. 16 & 17 Car. 2. c. 2.*" &c. and the last mentioned statute directs the sale of coals by the chaldron, containing 36 bushels *heaped up*, and according to the bushel sealed

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for that purpose at Guildhall in London, and so for a greater or lesser quantity. Whereas the bushel required by the statute 12 Ann. st. 2. c. 17. s. 11. as the standard coal measure is one
" made round, with a plain and even bottom, and to be 19
" inches and a half from outside to outside, and containing one
" Winchester bushel and one quart of water, according to
" the standard for the Winchester bushel described by the stat.
" 13 W. 3. c. 5. s. 28." &c.

LAWRENCE J. observed, that though the fact proved of the coals having been found short upon the re-measurement might be evidence of an offence under the latter act of the 26 Geo. 3., yet it might also be evidence *diverso intuitu* of a distinct offence under the former act of the 3 Geo. 2., unless that were repealed by the act of the 26 Geo. 3.

LE BLANC J. There is nothing inconsistent in the idea that the same fact may be adduced in evidence *diverso intuitu* of different offences; and it does not necessarily follow that the one act was intended as a repeal of the other; for the second act goes further, and provides for a case which was left untouched by the first act; for the coal-merchant may measure out the coals in the first instance with a proper bushel, so as to comply with the terms of the stat. 3 Geo. 2., and yet may afterwards withdraw a part of them before the delivery, which would fall within the penalty of the stat. 26 Geo. 3. when re-measured and found short.

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The Court, however, principally upon the doubt whether the stat. 3 Geo. 2. were a subsisting law at the time of the offence committed, granted a rule to shew cause; intimating at the same time that as the principal question might be raised upon a motion in arrest of judgment, it would be more convenient to consider it in that shape; and to take both rules into consideration together.

The case was argued in this term by *Garrow* and *Marryat* in support of the verdict, and by *Erskine* and *Harrison* contra: but it is unnecessary to detail the arguments; for as to the matter of fact, it was admitted that the evidence would have been sufficient to sustain the second count, if the same fact had not been made a substantive offence, punishable in a different manner by the subsequent statute of the 26 Geo. 3.: and as to the question of law, it was ultimately decided on the ground of the non-existence of the stat. 26 Geo. 3. c. 108. at the time, upon which the principal argument turned.

With

With respect to the application of the evidence to the count,

Lord ELLENBOROUGH C. J. observed, that the offence charged was the not having *justly measured*, &c. of which there was double proof; first by the evidence of the carter, which went to shew *prima facie* at least that the coals had not been measured at all; and next by the evidence of their having been found short upon the re-measurement, which shewed that they had not been *justly measured*.

With respect to the stat. 26 Geo. 3. c. 108. LAWRENCE J. referred to the 27th section, which directs its commencement from the 24th of July 1786, and its continuance till the 24th of June 1795, and from thence to the end of the then next session of parliament. Then the act of the 36 Geo. 3. c. 61., which was doubtless intended to continue that act, because it refers to the period of continuance named therein, by a strange blunder re-enacts several former acts which were intended by the provisions of the 26 Geo. 3. to have expired, and totally omits the latter, which therefore expired at the end of the next session of parliament after June 1795, and consequently was not in force at the time of the offence committed.

This suggested to the defendants' counsel another objection to the action as founded upon the stat. 3 Geo. 2. c. 26.; namely, that by the subsequent act of the 19 Geo. 2. c. 35. s. 9. all coals sold by wharf measure (as in the present case), within the limits in question are required to be "measured in such manner as is directed by the stat. 16 & 17 Car. 2. c. 2." which therefore, they said, operated as a repeal of the stat. 3 Geo. 2., which latter refers to the measure appointed by the stat. 12 Ann. Then the stat. 26 Geo. 3. c. 108. s. 27., which repealed the stat. 19 Geo. 2., amongst other laws, having itself expired at the end of the next session of parliament after June 1795, the stat. 19 Geo. 2. of course revived, and was in force at the time of the offence, committed and was so considered by the stat. 36 Geo. 3. c. 61., which continues it in express terms to June 1810, &c. and therefore the stat. 3 Geo. 2. c. 26. was again virtually repealed.

Lord ELLENBOROUGH C. J. That would not necessarily follow, for a law, though temporary in some of its provisions, may have a permanent operation in other respects. The stat. 26 Geo. 3. c. 108. professes to repeal the stat. 19 Geo. 2. c. 35. absolutely, though its own provisions, which it substituted in the place of it, were to be only temporary.

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LAWRENCE J. At any rate the argument does not apply here; for the stat. 19 Geo. 2. c. 35. was in itself only a temporary law, continued down by several acts to the 21 Geo. 3., which was one of the acts repealed by the stat. 26 Geo. 3. c. 108. and, the stat. 21 Geo. 3. c. 34. would of itself have expired by the time limited for the continuance of the stat. 26 Geo. 3. Then the stat. 36 Geo. 3. c. 61. mistakenly assuming that the act of the 19 Geo. 2., which had been continued down only to the 24th of June 1795 and to the end of the then next session of parliament by the stat. 21 Geo. 3. c. 34., and which, together with the latter act, was then repealed, was still existing, professes to continue a non-existing act as amended by other non-existing acts, and wholly omits the act of the 26 Geo. 3. c. 108., which had repealed the stat. 19 Geo. 2. and the 21 Geo. 3., and which was the real statute meant to have been continued from the period referred to. This blunder was afterwards rectified by the stat. 42 Geo. 3. c. 89. (a), which reciting that the stat. 36 Geo. 3. c. 61. was passed in order to continue the 26 Geo. 3. c. 108.; but that that act having before expired, doubts had arisen whether it were in force, it therefore enacts that the latter statute shall be revived from and after the passing of this act, which was on the 22d June 1802.

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The defendants' counsel then suggested that by the last-mentioned act of the 42 Geo. 3. it was provided "that all acts, matters, and things done or performed in pursuance of or according to any of the clauses, powers, or provisions of the act of the 26 Geo. 3. should be and were thereby declared to be as valid and effectual in every respect as if the said act of the 26 Geo. 3. had been revived and continued by the stat 36 Geo. 3." and therefore that it would still operate as a subsisting law for the whole period. But

The Court said that that provision was only introduced to indemnify persons who had done acts in the execution of the powers conferred by the statute for carrying it into effect: but could not be construed to remedy omissions or secure offenders from penalties incurred under any other subsisting law at the time. That here it appeared on the whole that the act of the 3 Geo. 2. was in force at the time, and the act of the 26 Geo. 3.

(a) Of public local acts.

f. 108.

c. 108. had expired; and therefore there could be no question but that the penalty under the former act might be recovered.

Rules discharged.

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The KING against MORRIS.

The KING against STEWART.

Wednesday,
Jan 26th.

THESE were rules calling upon *Morris*, the late, and *Stewart*, the present mayor of *Weymouth* and *Melcombe Regis*, to shew cause why an information in nature of quo warranto should [114] not be exhibited against them respectively, to shew by what authority they claimed to exercise the office of mayor.

The boroughs of *Weymouth* and *Melcombe Regis* are united together, and the corporation consists (under charters of Queen *Elizabeth* and of *James* the First and *George* the Second) of a mayor, 8 aldermen, 24 principal burgesses, and an indefinite number of common burgesses. In the election of mayor, the mayor and aldermen, or the major part of them, chuse four persons out of the burgesses and inhabitants, of whom the corporation at large elect one to be mayor. On the 21st of *September* 1801, the charter day, the defendant *Morris* was elected mayor, and the defendant *Stewart* on the same day in the following year was elected to succeed him in the same office. The elections were made in the manner above stated, except in this respect, that at the election of *Morris* in 1801 the number of principal burgesses who by the constitution of the borough formed an integral part of the corporation, were reduced to eight, of whom only six attended the meeting, and in 1802 seven of the eight attended on the election of *Stewart*.

Gibbs and *Templeman*, in shewing cause against the rules, observed that the object of them was to dissolve the corporation; because as the number of principal burgesses, forming an integral

It is no objection to the persons applying for an information in nature of a Quo warranto which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeach on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and

afterwards attended other corporate meetings at which such mayor presided. The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself.

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part of the corporation by the charters, was 24, and the election was to be made by them in conjunction with the other integral parts of the corporation, and as each integral part could only attend by a majority of its whole number, no corporate meeting at which the principal burgesses were required to attend could now legally be holden, as their number was reduced more than half. Waving therefore any discussion on the merits of the case, which they reserved for another occasion, they confined their objection to the relators themselves, on whose affidavits the rules were obtained. These were two persons of the names of *Arbuthnot* and *Browne*, who were aldermen, and who were sworn to have been present as such at the two meetings in question for the successive election of mayors, at both which meetings they voted (*a*). Besides which they had attended subsequent corporate meetings as aldermen, at which *Morris* and *Stewart* respectively presided as mayor. It was contended to be immaterial for whom the relators voted on the several occasions, because at any rate their giving any attendance at such meetings was a recognition by them of the existence of the corporation and of the legality of the meetings themselves, and precluded them from now insisting that the corporation was during all that time dissolved by the loss of an integral part, according to the doctrine in *Rex v. Pasmore* (*b*), and *Rex v. Belringer* (*c*), and other cases. Besides which it was also sworn, that at a meeting holden after the last election of mayor, the relators had voted for candidates to fill up the vacancies of principal burgesses. And they referred to *Rex v. Stacey* (*d*), where one of the grounds for refusing the information was the acquiescence of the persons applying for a long space of time without complaining, until the corporation had been drawn into a risk of dissolution by the delay.

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LORD ELLENBOROUGH C. J. It does not appear that the persons making this application have lain by *malâ fide*, or indeed that they even knew that the corporation was in a state of dissolution when they attended the election of these officers which

(*a*) The affidavit did not state for whom they voted, and it was understood that they voted for other candidates.

(*b*) 3 Term Rep. 199. (*c*) 4 Term Rep. 810. (*d*) 1 Term Rep. 1.

they

they now impeach. Doubts may have occurred or been suggested to them since, that the franchises which they and the rest of the corporation were exercising were usurpations upon the Crown; and they may fairly apply to this court to know whether or not they now hold their offices by right. It does not appear that they have conducted by their conduct to put the corporation into the state in which it now is, which furnished a ground of objection in *The King v. Stacey*.

LAWRENCE J. If the present situation of the corporation had been induced by the conduct of the parties applying for the informations; if we saw reason to believe that they had been purposely lying by until they had brought the corporation into an inextricable difficulty, they would now have come forward with an ill grace to complain of that which they themselves had been instrumental in procuring, and within the authority of the cases the Court would have been justified in rejecting the application coming from such a quarter. But these applicants do not appear to stand in this situation. They have not contributed by their own acts to the difficulty. The corporation was dissolved, if at all, before these elections took place; and I am not aware of any case which has gone the length of warranting us to reject the complaint of persons so circumstanced. In *The King v. Stacey* a former application had been made by two of the freemen, who had acquiesced in the very election they afterwards came to complain of; and in the case reported, some of the relators acknowledged that they applied at the instigation of the same persons whose application had before been rejected: and this was principally relied on both by Lord *Mansfield* and Mr. Justice *Buller*, to shew that in truth the then application originated with the same parties.

Per Curiam,

Rules absolute.

Less Serjt. and *Præd Serjt.* were to have sustained the rules.

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against
MORRIS and
STEWART.

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BULWER,

*Wednesday,
Jan 26th.*

BULWER, Clerk, *against* HASE.

Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church against which it was proposed to erect a monument, to the granting of which the rector dissented, notwithstanding which the Court below were proceeding to grant the faculty with the consent of the Ordinary; held to be no ground for a prohibition, but mere matter of appeal if the rector's reasons for dissenting were improperly over-ruled.

THE plaintiff applied for a prohibition to the episcopal consistorial court of *Norwich* to prohibit it from holding plea of the matters there depending: the object of the application being to restrain the ordinary from granting a faculty to the defendant for stopping up a certain window in the parish church of *Sall* in *Norfolk* for the purpose of erecting a marble monument to the memory of his wife against it.

The plaintiff stated in his affidavit that he was the rector of the parish of *Sall*, in which the defendant was a considerable proprietor. That the defendant had lately taken out the glass from the north window in the cross isle or north transept or recess of the church, and had bricked up the same, without any previous application to the ordinary or to the rector, intending to erect a monument against the window. That there was another place near where a monument might be erected. That the defendant continuing the work after notice of the rector's dissent, the latter commenced a prosecution against him in the consistorial court of *Norwich*, to compel him to re-open and reglaze the window: soon after which, viz. on the 25th of September 1802, the defendant obtained a mandate to be published in the parish church, citing the rector, churchwardens, parishioners, and inhabitants, and all others pretending to have any right, to appear in the same court to shew cause why a decree should not be made for a licence or faculty to be granted to the defendant to confirm the stopping up the window. That the plaintiff appeared, and declared his dissent as rector, and prayed the cause to be dismissed; which prayer was rejected, and another day given to proceed in the business. The affidavit concluded with stating, that though the faculty were not yet granted, yet for fear that it might, upon the supposition that the rector's dissent was not material, the prohibition was now prayed.

The defendant in his affidavit stated the consent of the ordinary and all the parishioners to his putting up the monument in the place in question; which (upon a question put by the Court to the counsel in the course of the argument) was stated to be in the body of the church, and not in the chancel.

Erskine

Erskine shewed cause against a rule nisi for a prohibition; and contended that though the rector has a freehold in the church, the ordinary has a discretion to direct what ornaments were proper to be placed in it, and consequently had authority to license the placing the intended monument there. This appears from several quotations by Dr. Burn (a) from the ancient ecclesiastical writers, and from the canons, whereby the ornaments of the churches are specially subjected to the visitation of the ordinary, who is required to direct what proper ornaments shall be provided, and to see that they are kept in proper repair. And by the statute *De circumspecte agatis*, 13 Ed. 1. ft. 4. the king directs the judges to use themselves circumspectly in all matters concerning the prelates, where they punish for that the church is not conveniently decked; *in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.* Most of the ecclesiastical writers refer the power of setting up monuments and the like to the consent of the ordinary, by whose direction they may also be removed if set up without consent. And in *Cart v. Marlb* (b) it was admitted on all hands that the power of licensing the setting up of monuments in the church was in the ordinary; though this court held that such power was to be exercised according to a prudent and legal discretion, which his metropolitan had a right to superintend and correct. At any rate, however, this application is premature; because if the rector's freehold in the church be invaded by what has been done, and the ordinary has no authority to grant the licence sought to be obtained, the rector may maintain trespass against the defendant, who will be left without any justification to the action, notwithstanding he should obtain the faculty from the ordinary; and therefore the prohibition is unnecessary.

LORD ELLENBOROUGH C. J. observed, that there did not appear any reason why this Court should grant a prohibition to the Court below: for the faculty sought to be obtained was no more than a licence from the ordinary himself to do the act proposed; and would not bind the rector against his consent, if by law his consent were material. And non constat that after the faculty was obtained, the defendant would make use of it without obtaining the consent of the rector also: and if he did, it

(a) 1 vol *Ecc. Law*, tit. *Church*, f. 8. per tot. (b) 2 *Str* 1030.
would

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would then be time enough for the rector to resort to his legal remedy.

Gibbs, in support of the rule, said that the reason for praying the prohibition in the first instance was lest it should hereafter be contended that the rector was bound by the granting of the faculty to which it was attempted to make him in some sort a party, by citing him to shew cause in the court below why it should not be granted. If granted, therefore, it might be argued to be done with the rector's consent, so as to conclude him, notwithstanding his dissent in fact. That after such dissent the Court below had no jurisdiction to proceed.

LORD ELLENBOROUGH C. J. If the rector be properly made a party to the suit below, and there urge any just reason to the court why the faculty should not be granted, which is improperly disregarded, it will be a ground of appeal to the superior tribunal. But as yet no common law right of the rector is touched which calls upon us to prohibit the ecclesiastical court from proceeding to grant a faculty.

LAWRENCE J. It appears from the case in *Strange* that the ecclesiastical court have jurisdiction of the matter. Then if the reasons urged by the rector against the granting of the faculty be improperly over-ruled, it is a ground of appeal, but not for a prohibition.

Per Curiam,

Rule discharged.

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Thursday,
Jan. 27th.

In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed there-to is the seal of the Court.

• *HENRY against ADEY.*

IN an action upon a judgment obtained in the island of *Grenada*, the plaintiff, at the trial before Lord *Ellenborough* C. J. at the Sittings after last term at *Guildhall*, proved the hand-writing of the Judge of the Court subscribed to the instrument purporting to be the judgment of the Court, but could not prove that the seal affixed to it was the seal of the island; for want of which proof the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit, on the ground that the proof of the Judge's signature to the judgment was the accustomed and accepted mode of proving foreign judgments,
 either

either as being in itself sufficient, or as evidence to authenticate the seal; which it would otherwise be difficult to do. But,

The Court held the nonsuit proper for defect of the proof of the seal. They said that they could not take judicial notice that the seal affixed was the seal of the island, which was necessary to be shewn in order to prove the judgment which it purported to authenticate. That proving the Judge's hand-writing could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. And they referred to the case of *Dr. Moises v. Dr. Thornton (a)*, where the production of a diploma under the seal of the university of *St. Andrew* in *Scotland*, and the acknowledgment of the hand-writing of the members subscribed thereto, was holden not to be sufficient evidence of the degree of doctor of physic which it purported to confer, without proof at least that it was the proper seal of the university.

A rule nisi was however granted afterwards for setting aside the nonsuit on an affidavit of surprize and mistake, and on payment of costs; which was on a subsequent day made absolute without cause shewn.

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against
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EDGAR and Another, Assignees of CARDEN, a Bankrupt, against Friday,
FOWLER and Another. Jan. 28.

THE plaintiffs declared for money had and received to the use of the bankrupt, money lent to the defendants, money paid, laid out and expended by the bankrupt, and on an account stated with the bankrupt before his bankruptcy. Plea non assumpsit. At the trial before *Le Blanc J.* at the last assizes at *Bristol* a verdict was entered for the plaintiffs with 20*l.* damages, subject to an application to be made to this Court to increase the damages to 40*g*/. 10*s.* upon the following case.

declared illegal by the stat. 19 *Geo. 2. c. 37.* after which the assured gave notice to the brokers not to pay the money over to the underwriter; and indemnified them for withholding it: held that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal, and the money not having been actually paid, but only credit given for it in account.

Where credit was given by insurance brokers in an account delivered in by them to an underwriter for the premiums of re-assurances, de-

(a) 8 *Term Rep.* 303.

The

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EDGAR
and Another,
Assignees,
&c.
against
FOWLER.

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The defendants were insurance brokers at *Bristol*. The bankrupt during the whole of the year 1799 and until *March* 1800, was used to subscribe as an underwriter policies of marine insurance at the office of the defendants. The defendants, according to the usual custom in that line of business, gave credit to the assured, and the bankrupt gave credit to the defendants for the premiums. In the months of *January* and *February* 1800 the defendants, by directions of Mr. *Pope* and of Mr. *Dinwiddie*, effected policies of re-assurance which were illegal under the stat. 19 *Geo. 2. c. 37.* and known by all the parties to be so; and which were respectively underwritten by the bankrupt before his bankruptcy. The premiums for the re-assurances underwritten by the bankrupt for *Pope* amounted to 126*l.*, and for *Dinwiddie* to 283*l. 10s.*, making together 409*l. 10s.* For these premiums the defendants gave the bankrupt credit in their account with him, and took credit in their accounts with *Pope* and *Dinwiddie*. No money passed on either side. Shortly after this the bankrupt applied to the defendants for his account, which was delivered him, and in which he had credit given him for these premiums. On this account a considerable balance appeared in favour of the bankrupt, but no settlement of the account took place. On the 23d of *April* 1800, a commission of bankrupt issued against *Carden*, under which he was duly declared a bankrupt, and the plaintiffs chosen assignees. After the bankruptcy some losses having happened upon the policies effected by the defendants on behalf of *Dinwiddie*, which by reason of the bankruptcy were not likely to be paid, *Dinwiddie* on the 27th of *December* 1800, gave the following notice to the defendants: "Take notice that I do forbid you and each of you to pay any money to the assignees of *William Carden* a bankrupt, or to any other, on account of any re-assurance, wager, or other illegal contract made between me and the said *W. Carden*, and upon any of which you are the stakeholders; and that I require you to hold all such stakes deposited by me in your hands for my use and benefit. And I do hereby undertake to indemnify you against all damages, &c. which you may suffer on account thereof." Dated *Manchester*, 27th of *December* 1800, and signed *Wm. Dinwiddie*.

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Pope likewise gave the defendants notice not pay over the premiums on the policies of re-assurance effected on his account;

count; and both he and *Dinwiddie* refused to allow them in their respective accounts with the defendants. The defendants immediately acquainted the plaintiffs with the notices they had received. On the 4th of *April* 1801, the plaintiffs accepted from the defendants their note at three months for 229*l.* 2*s.* 5*d.*, being the balance of the account due to the bankrupt, after deducting the 409*l.* 10*s.* the amount of these premiums, without prejudice to the question of law as to that sum. On the trial it appeared that the defendants had taken credit for 20*l.*, the difference between the premium and loss on a similar policy of re-assurance underwritten by the bankrupt for one of the defendants (*Fowler*), on which a loss had happened: and that although credit had been given by the two defendants to *Fowler* in his private account for the 20*l.*, yet such account had not in fact been settled between them, or the 20*l.* paid over. The learned Judge was of opinion that the defendants were not entitled both to deduct the 409*l.* 10*s.*, and likewise to take credit for the 20*l.*; and that at all events the plaintiffs were entitled to a verdict for 20*l.*: and the verdict was accordingly so taken, with liberty to move to increase it to 409*l.* 10*s.* The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover the premiums on the policies of re-assurance? If they were, the damages were to be increased to 409*l.* 10*s.*; if not, the verdict to stand as it was.

Jekyll for the plaintiffs observed, that the brokers stood in the situation of middle men between the assured and the underwriter, acting as agents for each respectively according to the nature of the act done. It was the duty of the defendants to receive the premiums on behalf of the bankrupt, and when, by giving him credit for them, they admit having received them, it is the same as if the assured had paid the money to the bankrupt himself; and the defendants having received the money as the agents of the latter, it is not competent to them to shift their character, and consider themselves merely as stakeholders between the two; nor can the assured recel the payment which they have once made, however they might have resisted making it in the first instance.

Lord ELLENBOROUGH C. J. The money does not appear to have been actually paid into the defendants' hands. In case of
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illegal transactions it may always be stopped while it is in transitu to the person who is intitled to receive it. If indeed this had been a legal transaction, the money might perhaps have been considered as paid. But we will not assist an illegal transaction in any respect. We leave the matter as we find it: and then the maxim applies melior est conditio possidentis. We cannot consider this as money paid for the use of the bankrupt: no money has in fact been paid, but only an account stated. If we were to sustain the plaintiffs' demand, we should be compelling the execution of an illegal contract as if it were a legal one.

Per Curiam,

Postea to the Plaintiff for 20l.

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Saturday,
Jan. 29th.

The KING *against* The Inhabitants of TARRANT LAUNCESTON.

Where a pauper purchased a leasehold tenement for less than 30l., and afterwards conveyed the whole term to one, in trust to let the premises, and out of the rents and profits to repay himself 10l. advanced thereon, and then to apply the rents and profits to the separate use

TWO justices by an order removed *John Coleman* from the parish of *Tarrant Launceston* to the parish of *Tarrant Rawson*, both in the county of *Dorset*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case.

About twelve years ago *John Coleman*, the pauper, gained a settlement in the parish of *Tarrant Rawson*, by renting above 10l. a-year: in *June 1795* the pauper, being then married, made a purchase for less than 30l. of a leasehold tenement in the parish of *Tarrant Launceston* for 99 years, determinable on three lives, under the Marquis of *Buckingham*, and resided there till *December 1801*; when being in distress, and relief refused by both parties, the pauper in consideration of 10l. advanced him by *W. Dean*, and for divers other valuable considerations, did grant, bargain, sell, and assign all his said leasehold estate with his said lease to *W. Dean*, to hold to the said of the pauper's wife during her life, and afterwards to the pauper's own use for life if he survived her, and afterwards amongst their children: and the trustee suffered the pauper to continue to reside in the house for above 40 days, till becoming chargeable to the parish he was removed; held that he gained no settlement by such residence; for he had no immediate interest remaining in him, at the time, but at most a doubtful and contingent future interest; it being uncertain whether the 10l. would ever be paid off, and even if it were, that not giving him any right to reside upon the premises.

W. D., his executors, &c. for the remainder of the term; in trust to let the premises, receive the rents, and thereout repay himself the said sum of 10*l.* with interest, and costs and charges; and after such re-payment, to receive and pay the clear rents and profits to *Elizabeth* the wife of the said *John Coleman* during her life, to her sole and separate use, not subject to the debts or contracts of her husband, and her receipt alone to be a discharge for the said rent: and after her decease, if *John Coleman* survived her, in trust to pay the rents and profits to the said *John Coleman*, to and for his own use and benefit, during his life; and after the decease of the survivor of them, the said *John Coleman* and *Elizabeth* his wife, and the re-payment of the said sum of 10*l.* with interest and costs, in trust that the said *W. Dean*, his executors, &c. should assign the said premises during the then residue of the said term unto the children of the said *John Coleman* then living, equally to be divided if more than one, if only one, to such only child: provided that if any child of the said *John Coleman* and *Elizabeth* should die during their lifetimes leaving issue, then the said *W. Dean* to assign to such child the share his parent would have had. A licence to assign was granted to *Coleman* under the Marquis of *Buckingham*. After the execution of this deed on the 5th of *December* 1801 *W. Dean* suffered the pauper to continue residing on the premises, and the pauper was residing there when he became chargeable, and until he was removed by the order of two justices, dated the 5th *February* 1802.

Const and *Wollaston*, in support of the order of Sessions, contended that the pauper was not removeable, either as having gained a settlement by residence on the estate in question, or at least as residing upon his own property, (though a purchase under 30*l.*) at the time of the removal. 1. The pauper gained a settlement by such residence; for though he could not gain a settlement in his own right, in respect of the purchase being under 30*l.*, yet after the conveyance to *Dean* in trust to repay himself the 10*l.* advanced, and afterwards in trust for the pauper's wife for life, remainder to himself for life, the pauper took a new estate in the premises by act of law, by virtue of which a settlement might be acquired, either in his character of mortgagor in possession, or by virtue of the equitable interest

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of his wife in it. In *R. v. Ilmington* (a)* a settlement was gained by a husband by residence on an estate purchased by his wife before marriage; which settlement was of course communicated to her, although the purchase-money were under 30*l.*, and consequently she could not have gained a settlement in her own right. The case which comes nearest the present is *R. v. Edington* (b). There a leasehold cottage held for 99 years determinable on lives, purchased by the pauper's wife before her first marriage, was in the lifetime of her husband conveyed by them to a trustee, in trust that he should by sale or mortgage raise 10*l.* (for the benefit of the parish by whom the family had been before relieved to that amount) interest and charges, and after payment of the same, in trust to re-assign the premises. The value of the cottage did not appear, though probably from the circumstances it was under 30*l.*, and was so considered to be by Lord *Keynon*; nor did it appear that the money was ever paid to the parish; but the parties having continued in possession, it was holden that on the death of the first husband, the pauper who had married the widow gained a settlement by residence on the property for forty days. There too it was contended, that by the conveyance to the trustee the whole interest was out of the pauper's wife, and that it was a sale and not a mortgage: but the Court held that the conveyance was no more than equivalent to a mortgage. And the marriage in that case subsequent to the purchase was as much an act of the parties as the conveyance in this case. But, 2dly, at any rate no other person than the trustee to whom the property was conveyed could dispute the pauper's right of possession in this case; and he not having ejected him, it was not competent to the parish officers to procure his removal from the property, in which his wife as well as himself had an equitable reversionary interest. Upon payment of the 10*l.* he was entitled to reside on it immediately in right of his wife. And this is not like *Rex v. Catherington* (c), where the mortgagor of a house after having been ejected by the mortgagee was permitted to inhabit it for the particular purpose of overlooking some repairs: for here the possession has always remained with the pauper.

(a) *Burr. S. C.* 366. (b) *Ante*, 1 vol. 288. (c) 3 *Term Rep.* 771.

Burrough and *Harris* contra. This was not a mortgage; for a mortgage is a pledge of the estate for a sum of money, on the redemption of which the party is entitled to take it again: but here the pauper was not entitled to any thing; he had no intermediate interest left in him; which is the ground on which a settlement is gained by a mortgagor residing on the mortgaged premises, in whom there is an interest existing and co-temporaneous with the residence: the pauper had assigned the whole term to *Dean* as a security for the 10*l.* advanced, and that was never repaid. He was no more than a tenant at sufferance. Neither was he entitled to reside there in right of his wife, supposing the 10*l.* to have been paid off; for the husband is by law bound to provide a suitable residence for his wife, and the house being then to be holden in trust for her separate use, the trustee would have been guilty of a breach of trust to have given it up to the husband unless in the character of a tenant paying rent for it. *Rex v. Eddington* was put on the footing of a mortgage; for on payment of the money lent, the premises were to be re-assigned to the party. The pauper's continuing in possession here was a fraud upon the trust, and therefore could no more give him a settlement than the fraudulent possession by the mortgagor whose debts exceeded the value of the mortgaged premises in *R. v. St. Michael's Bath*, (a). Then again, there is no instance of a settlement gained by the act of the original purchaser of an estate under 30*l.* value. In order to acquire a settlement by residence on such a property, it must come to the party through whom the settlement is acquired by act of law. Supposing any equitable interest to have resulted to the pauper from the conveyance to *Dean*, that was his own act, and therefore could not confer a greater right upon him than he had before; he must still claim from the deed, which is his own act: but it is otherwise in the case of marriage, where though the marriage itself be the act of the party, the law gives to the husband a consequential interest in the property of the wife. Here the pauper had no interest left in the premises, and consequently was liable to be removed though resident there; for according to Lord C. J. *Ryder* in *R. v. Marwood* (b), a man is only irremovable from an estate so long as his *property continues* as well as his residence on it.

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(a) *Doughl.* 630. *Cald.* 110.(b) *Burr.* S. C. 389.

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LORD ELLENBOROUGH C. J. If the case were *res integra*, I should have done no more than apply my understanding to the plain letter of the statute 9 Geo. 1. c. 7. s. 5.; which says, that "no person shall be deemed to acquire any settlement in any parish for or by virtue of any purchase of any estate or interest in such parish, whereof the consideration for such purchase doth not amount to the sum of 30*l.* bona fide paid, for any longer or further time than such person shall inhabit in such estate," &c.; that is, for so long only as there is an union of *interest and occupation* in the thing. We must however take care not to contravene any of the authorities which have put a construction upon these words, but preserve an uniformity of decision. The case of a mortgagor has been pressed upon us: but was this a residence of the pauper as mortgagor? Surely not. He had parted with the absolute interest which he had in the premises. For even when the 10*l.* is paid, (which non constat is ever likely to be done) the trustee is to account for the rents and profits to the wife for her separate use during her life: and I think there is much weight in the observation which was made against any claim of the husband to reside upon property so circumstanced in right of his wife. In the first instance however, and during the time of his residence there, the trustee was entitled to the rents and profits till the 10*l.* advanced by him was paid: it was contingent whether that would ever be done, whether the wife would ever be entitled to the rents and profits, and if she became so, it was also contingent whether the pauper would survive her, so as to have any claim of his own. I should therefore be much inclined to ask with Lord Mansfield in *The King v. St. Michael's Bath* (a), "what interest had the pauper in this estate? He made an immediate conveyance to trustees, not a mortgage to pay off debts," &c. Now this was no mortgage, but an absolute conveyance for the discharge of a debt; and even the payment of the 10*l.* would not entitle the pauper to redeem, but would only raise the wife's trust estate. In the last-mentioned case Lord Mansfield observed, that it was very doubtful whether after payment of the debts there would be any surplus: so here I might say, there was no chance of a surplus of estate to the pauper upon which he would have a right to reside. Upon the whole, this was at most such a doubtful con-

(a) Dougl. 631.

tingent

tingent interest in the pauper, that without clashing with any of the adjudged cases I am authorized to say that no settlement was gained by the pauper's residence on this property.

The other Judges declared themselves of the same opinion.

Order of Sessions quashed.

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The Case of JOHN TAYLOR.

Saturday,
Jan. 29th.

JOHNTAYLOR was yesterday brought into court in custody of the keeper of *Newgate*, by virtue of a writ of habeas corpus issued on the plea side of the court. To which the keeper returned, that he was committed to his custody by a warrant under the hands and seals of three commissioners named in a commission of bankrupt issued against him to be kept without bail or mainprize until he should to their satisfaction answer certain questions stated in the return.

Manley moved on behalf of the bail in two actions depending in this court against the prisoner, that he might be surrendered in those actions in discharge of *them*, that he might be committed to the marshal pro forma, and then re-committed to *Newgate*.

But *The Court*, on the suggestion of the Master, determined that *Taylor*, being in custody on criminal process, ought to have been brought up by a habeas corpus issued on the Crown side of the court. And therefore he was for the present taken back to *Newgate*, and a rule entered on the Crown side that a writ of habeas corpus ad subjiciendum * should issue to bring him up again. He was accordingly brought up again on this day by virtue of such a writ of habeas corpus; and on *Manley's* motion a rule was taken on the Crown side for his surrender in the actions, his commitment to the marshal, and his being taken out of the marshal's custody and re-committed to *Newgate*, charged with the several matters against him.

One, who was committed to *Newgate* by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit be brought up by a habeas corpus issued on the Crown side of the court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment pro forma to the marshal, and

his re-commitment to *Newgate* charged with the several matters.

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1803.

Tuesday,
Feb. 1st.

BEATSON against SCHANK and Others.

Where a charter-party of affreightment provided that in case of the
 "INABILITY
 "OF the
 "ship to execute
 "the service,"
 certain persons should be at liberty to make such abatement out of the freight as they should think reasonable; held that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room.

THE plaintiff declared in covenant against the defendants upon a charter-party of affreightment, made the 6th of April, 1799, between the plaintiff on behalf of himself and all the other part owners of a certain vessel called the *Asa*, of 816 tons, then in the river *Thames*, of the one part, and the defendants by the description of the Commissioners of the Transport Office, on behalf of his Majesty, on the other part; whereby the plaintiff let to hire and freight the said ship to the commissioners, the defendants, to receive on board at such ports as should be directed all such soldiers, horses, women, servants, arms, ammunition, provision, stores, or whatever else should be ordered to be put on board her, and proceed therewith to such ports as should be required, and after having landed the laid soldiers, horses, and stores, to receive on board such others, with their baggage, &c. as should be put on board her, and proceed therewith as should be directed. The said ship to continue in pay for twelve months certain, and afterwards till discharged from his Majesty's service. The defendants did thereby hire the said ship for the said time and service accordingly. And the plaintiff thereby covenanted that the ship was * strong, &c. and substantial, and coppered, and should sail forthwith near to or *Deptford* (wind and weather permitting), equipped and provided with masts, sails, &c. and proper boats, &c. necessary for such a voyage, and with furniture and all other materials and things necessary for such a ship for her intended voyage, &c. together with various enumerated articles, agreeable to a model at the transport office, *Deptford*. And the ship was to be manned in proportion to five men and a boy to 100 tons, fit and capable to manage and sail her, and should have 20 carriage guns mounted, &c. and with powder and shot in proportion; as also with good victuals sufficient for the men during the service; and the whole number of men to be constantly on board; and a regular book kept of their entries and discharges, &c. And that the master should receive on board the ship from time to time such a number of soldiers, and other persons, horses, provisions, provender, naval and victualling stores, recruits, or what-

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ever else there should be occasion for the King's service, as should be directed, and as he could reasonably carry, and should therewith proceed to such place, &c. as the commissioners or the officer in chief whose command he shall be under should order, landing and delivering the same accordingly, and so from time to time during her continuance in the said service; in performance of which the master and his men with his boats should be aiding and assisting. And that the said master should sign receipts, bills of lading, or other proper indents for what he should receive on board, (men and horses excepted), and be accountable for the same: who likewise was thereby obliged to keep a true log-book of the wind and weather, &c. and at the end of the service deliver the same into the Transport Office upon oath if required, together with all orders and instructions that he should receive. And upon the arrival of the ship at any place should send immediate notice thereof to the said commissioners. In consideration of which covenants the commissioners covenanted for and on behalf of his Majesty, that the plaintiff should be paid for the hire and freight of the ship the sum of 9,700*l.* for the twelve calendar months; *provided she should not be lost or captured within that time.* But in case of such event, the freight to be paid should be for no more than the time she might actually be employed, according to the rate of the said 9,700*l.* for twelve calendar months: and should the ship be continued in his Majesty's service longer than the said twelve calendar months, then the owners were to be paid the same rate of hire *per* month as other coppered ships (then at 15*s.* per ton) might have, and what others might be engaged at, with the usual interest on Transport Office bills added thereto; which freight or pay should commence on producing a certificate from the proper inspecting officer belonging to the Transport Office of the ship's being completed, fitted, victualled, manned, and provided with proper necessaries and stores for the ship and company, ready and fit to sail when required, and the same should also cease and determine at the time of the discharge, on the conditions before mentioned. And the plaintiff should, on signing and sealing thereof, receive a bill of imprest as part payment for one third of the said 9,700*l.* upon account, after being certified as aforesaid as ready to proceed, &c.; and after the ship

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should have been in the service six months he should have a bill of imprest for one third more, and the remaining one third of the said 9,700*l.* as soon after the expiration of the said twelve months as 2000*l.* should be due on account for the "monthly hire; provided a certificate should be produced to the commissioners under the hand of an agent of transports or commanding officer of his Majesty's ships at the place where the said ships might be of her continuing in the service, and two months' hire at the expiration of every four months after, as was the usual practice with regular transports, &c. and the remainder on passing accounts in the established manner after being discharged. The plaintiff then proceeded to aver performance of the several matters covenanted by him to be performed, (amongst others) *that the whole number of men were constantly on board the ship*: and in fact that the ship was continued in his Majesty's service under the said hiring *longer than the said twelve calendar months*, namely, for twenty-two months, and that other coppered ships at the time were at 15*s.* per ton per month during those twelve months, and afterwards for ten months at the rate of 1*l.* 10*s.* per ton per month. That the plaintiff afterwards produced to the defendants the certificate required of the ship being properly provided, &c. and all other customary certificates, &c.; whereupon there became due from the defendants for the hire and freight of the ship divers sums, &c.; and although the defendants had paid the sum of 9,700*l.*, yet they had not paid the sum of 13,000*l.* according to the form and effect of the charter-party.

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To this the defendants pleaded 1. the general issue; on which issue was joined, 2d. As to 2418*l.* part of the 13,000*l.* supposed to be due, that by the charter-party is was provided that "upon the loss of time, breach of orders, or neglect of duty by the said master, or from the ship's inability to execute or proceed on the service on which she might be employed, being made appear, the said commissioners should have free liberty and be permitted to *mult*, or make such abatement out of the freight and pay of the said ship as should be by them adjudged fit and reasonable." And then they aver, that the ship while she continued in the service, viz. for 182 days, by and from the said ship's inability to execute and proceed on the service on which she was employed as aforesaid, was detained and laid up at *Quebec* in North America, and

and did not proceed on the said service. Whereupon afterwards, viz. on the 15th of *April* 1801, upon the same being made appear, *the said commissioners did mulct and make an abatement out of the freight and pay of the ship of the said 2418l., the same being by the said commissioners adjudged fit and reasonable in that behalf, according to the form and effect of the charter-party.* 3dly. The defendants relying further upon the above-mentioned proviso, plead that on the 14th of *November* 1799 the ship, being then at *Quebec* in *North America*, was duly ordered to proceed and sail with divers soldiers, &c. on board for the King's service from *Quebec* to *Halifax* in *Nova Scotia*; yet *the ship did not proceed and sail according to such order, but on the contrary remained at Quebec 182 days in breach of such order.* Whereupon afterwards, on the 15th of *April* 1801, upon the same being made appear to the commissioners, *they mulcted and made abatement, &c. (as before).* The 4th plea was to the same effect, only stating the cause of the mulct and abatement made by the commissioners under the proviso to be, for that *by the loss of time, and neglect of duty by the master in not procuring and having the necessary complement of men to navigate the ship, she was detained at Quebec for 182 days, without executing or proceeding on the service on which she was employed.*

The plaintiff by his replication took issue on the second plea as to the ship's *inability* to proceed: as to the third he pleaded, that the master of the ship did proceed and sail with her from *Quebec*, according to the order and requisition in that plea mentioned; and as to the fourth, that the ship was not by the loss of time and neglect of duty of the master detained at *Quebec* in manner and form, &c.; on which issues were joined.

At the trial before Lord *Kenyon* C. J. at *Guildhall* a special verdict was found, stating in substance, as to the first issue, that the defendants had paid to the plaintiff all the money due for the freight and hire of the ship *Asia*, according to the form and effect of the charter-party, except 2,418l. after mentioned. And as to the other issues, that the ship *Asia* was in *May* 1799. taken into and employed in the service within mentioned, and continued therein until the 12th of *March* 1801. That on the 24th of *August* 1799 the ship, pursuant to the order of the defendants, sailed from *Cork* in *Ireland* with her full complement

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plement of men, and about 700 soldiers, women and children on board, strong, &c. and well equipped, furnished, and provided in all respects, and arrived at *Quebec* in *North America* on or about the 20th of *October* 1799. That immediately after the ship's arrival at *Quebec* orders were given to the master of her from Lieutenant General *Hunter*, the commander in chief of the forces at *Quebec*, being the officer in chief whose command the said master was under, to disembark the troops as soon as possible, and to get the ship ready for sea, and to report when she was ready. That the ship was reported by the master to be ready to receive troops on the 1st of *November* and not before, and to be ready for sea on the 3d of *November*. That on the 1st and 2d of *November* then next following upwards of 1100 soldiers, women and children, were sent on board the ship; and the master was ordered by the said lieutenant general, being such officer as aforesaid, to proceed therewith to *Halifax* as soon as possible. That during the first-mentioned voyage from *Cork* to *Quebec*, in consequence of the small pox being introduced into the said ship by a child infected therewith, the said disorder and other distempers greatly prevailed on board the ship; the third mate and one seaman died during the said voyage; and after the ship's arrival at *Quebec* the crew were further reduced by the sickness of the major part thereof, of whom twelve were obliged to be sent ashore to sick quarters. That the crew was further reduced by the desertion of six men on the 21st of *October* 1799, which desertion was occasioned by the fear of the disorder on board the ship: and by such desertion the said six men forfeited their clothes and the wages then due to them. That the master of the ship used every possible exertion to supply the deficiency of hands and to proceed to sea; but the ship did not proceed according to the said orders, being unable to procure a sufficient number of proper hands to navigate her; for which reason it was wholly impracticable to proceed on the voyage from *Quebec* to *Halifax*: wherefore the troops and other persons sent on board as last mentioned were disembarked on the 15th of *November* 1799; and the ship was laid up on shore till the 16th of *May* in the year 1800. Whereupon, on the 15th of *April* 1801, upon the same being made appear, the said commissioners did mulct and make an abatement out of the freight and

and pay of the ship of the sum of 2,418*l*. the same being then by the said commissioners adjudged fit and reasonable in that behalf; whereof the plaintiff had notice. But whether, &c.

* *Cassius* for the plaintiff. The doubt arises on that clause in the charter-party stated in the plea, which provides that "upon *loss of time, breach of orders, or neglect of duty* of the master, or *from the ship's inability to execute or proceed on the service* being made appear to the commissioners, they shall be at liberty to *mult or make such abatement* out of the freight as they shall adjudge fit and reasonable." And the question will be, Whether the commissioners must not shew a good legal cause to warrant the exercise of the discretion vested in them of *multing* or making an abatement in the freight. The charter-party, being a commercial instrument, must be construed liberally, and according to the true spirit as well as letter of it. Four instances are stated in which the power of *multing* in discretion is to be exercised; 1. upon loss of time; 2. upon breach of orders; 3. from neglect of duty; 4. from the ship's inability to proceed on the service. But nothing is stated in the special verdict which will warrant the *mult* upon either of those grounds. 1st. "*Loss of time*" must mean willful or negligent loss of time, which is not found by the verdict. It cannot be construed to mean loss of time from wind or weather or other accident beyond the control of the master and crew. 2dly, "*Breach of orders*" must be understood to mean breach of *legal* and *practicable* orders: For a breach of an order to throw a person overboard would not subject the party to be *multed*. So, 3dly, "*Neglect of duty*" of the master must mean some positive and wilful omission to do what he was bound to do and had the power of performing. 4thly, and lastly, "*The ship's inability to execute or proceed on the service*" cannot mean inability in the abstract from whatever cause it might arise, but must in reason be confined to an intrinsic inability of the ship itself to perform the stipulated voyage and service, as from not being sea-worthy, want of necessary apparel, and the like. Nothing of this sort is found by the jury: but the substance of the special verdict is that the ship sailed from *Cork* on the voyage fully provided in all respects, and arrived at *Quebec*, her first destined port: but that during the voyage the small pox, which had been introduced on board without any default

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fault of the master, made such ravages amongst the crew, that the further prosecution of the service for a certain time became physically impossible, for want of a sufficient number of sailors to navigate her. The cause, therefore, of the non-performance of the order to proceed arose either from the act of the defendants or those acting under their directions, in sending persons on board who were infected with the disorder, or at least from the act of God : and in either case the plaintiff would be excused from the performance of the condition, as is said in *Co. Litt.* 206. *a.* There was no default in the master : he was bound to take on board such persons as were ordered to embark : and when he was afterwards directed to proceed to *Halifax* it is found that he used every possible exertion to supply the deficiency of hands occasioned by sickness and desertion, and to proceed to sea, but that for want of a sufficient crew it was wholly impracticable for him to comply with the order. Nothing appears in the charter-party to shew that the plaintiff was meant to be an insurer as well as freighter for the voyage. In *Hotbam v. The East India Company (a)*, it was considered that a freighter was not an insurer ; and that a stipulation on the part of ship-owners to be liable only for ship damage did not include damage by the act of God, as by storms, but such only as was incurred by their own or their servants' default, as from defects in the ship or improper stowage. He also mentioned a case of the executors of *Wilkinson* against the commissioners of the navy *(b)*, where

(a) *Dougl.* 271.

(b) The first trial was before Lord *Mansfield* at the sittings after *Hilary* term 1785, at *Guildhall*, when a verdict was found for the plaintiff, against the directions of his lordship. A new trial was granted in *Easter* term, 25 *Geo.* 3. and a replender also awarded. The case referred to at the bar was upon the second trial. By a note which I took of the first trial, it appears that the first count of the declaration stated in substance that the plaintiff's testator, being the owner of a ship, chartered her to the commissioners of the navy as a transport to carry provisions to *America* ; that she was ordered to proceed to *Halifax* ; and that the vessel accordingly proceeded in her way thither ; but that owing to bad weather the captain, after making several fruitless attempts to reach *Halifax*, was obliged in order to preserve the ship and crew to bear away for *Barbados* ; that the commissioners

where upon a similar question respecting the right of the commissioners to mulct the owner on account of the vessel having borne away to the *West Indies* instead of going to *Halifax* according to orders, it being proved at last to the satisfaction of Lord *Mansfield*, assisted by the advice of Admiral *Campbell*, that the captain was constrained to do so by stress of weather for the safety of the ship and crew, the plaintiffs recovered a verdict under his lordship's directions.

LAWRENCE J. observed, that the question here was not whether the commissioners might mulct the plaintiff as for wilful breach of orders or neglect of duty; but whether it were not competent to the parties to agree, that if by any means that which the plaintiff undertook to perform were not done, though nobody were to blame, yet there should be an *abatement* of the

sioners of the navy, according to the stipulations of the charter-party, exercised their authority as arbitrators, and unjustly and without good reason mulcted him the sum of 700*l.* (the whole freight) for not having performed his voyage; for which sum the action was brought. There were several other counts to the same purpose. The defendants pleaded the general issue, and also pleaded specially all the orders and the breach of them, and that there was a proviso in the charter-party that if it should be made appear to the commissioners that there had been any neglect of duty or breach of orders in the captain of the vessel, the commissioners should have power to mulct him in so much money as they should think proper, &c.; that it had been so made appear to them, and they had exercised their power accordingly to the amount stated. To this latter the plaintiffs replied, that it was not so made appear to the commissioners, on which issue was joined. Lord *Mansfield* thought that this replication might have been demurred to; and he instructed the jury that they must convict the commissioners of corrupt behaviour if by their verdict they said that it did not appear to them that the captain had been guilty of neglect of duty or breach of orders; that it was a different thing what appeared to them, the jury, from what appeared to the commissioners; the jury might have different evidence laid before them; and even the same facts might make different impressions on different men's judgments. He also observed upon the merits of the case, that the brethren of the Trinity House, who assisted him, were of opinion that the captain was not compelled to go to the *West Indies*, and if the jury were of that opinion they would find for the defendant. The jury, however, found a general verdict for the plaintiffs.

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freight to be settled in the discretion of the commissioners! in other words, that the loss should be borne by both parties.

GROSE J. It was considered that losses might arise from direct breach of duty, or negligence of the captain, or from accident or necessity, or from mixed causes; of all which the commissioners, who have no personal interest at stake, might be considered as competent and fair judges.

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Wood for the defendants, The meaning of the proviso is, that in certain stipulated cases where the public service was not performed, though in some instances without the default of the master or vessel, the commissioners should have power to *mult* or make an *abatement* in the freight. The very use of these two terms shews that the parties looked as well to losses without, as by the delinquency of those concerned. The power was to be exercised in case of *the ship's inability to execute or proceed on the service*; and the fact found is that she was not able to proceed on her voyage for want of a sufficient crew to navigate her. It was the plaintiff's duty, and he covenanted to have a full complement of men always on board. And the desertion of the men can be no excuse for the non-performance of an express covenant to provide them; nor even the act of God; for in case of death, sickness, or the like, the plaintiff was bound to provide others. When he entered into the contract he knew that contingencies of this sort were likely to happen; and he might either have guarded against the event by a supernumerary complement of men, or by offering additional wages on the spot. Where the law imposes an obligation, the act of God intervening to prevent the performance will indeed excuse the party; but not where he contracts to do an act. *All. 27. Taylor's case, 4 Leon 31. 1 Roll. Abr. 450. Condition, pl. 8.* The case of the carrier is an exception; but even he is liable for loss happening by an armed force which he cannot resist; though no blame be imputable to him. There is no pretence to say that the disability which ensued is to be attributed to the act of the defendants in sending any person with the small pox on board the ship: it was unknown to them, and no objection was made at the time. No question can arise on the reasonableness of the abatement, which was only of half the freight during the time

the ship was laid up, when there was no wear and tear, nor wages of seamen running.

* *Cassilis* in reply observed, that an *abatement* in the freight operated to all intents and purposes as a *mulct*, and was used synonymously: in either case it was subtracting from the sum which the plaintiff would otherwise be entitled to receive. That the desertion, if it could be so called which arose from a justifiable motive to avoid pestilence and death, was attributable solely to the disease which prevailed, which at any rate was the act of God; and the distinction taken in *Co. Lit.* 206. a. is, that if the condition be impossible at the time of making it the obligation is single; but if it be possible at the time, and before it can be performed it become impossible by the act of God or of the law, there the obligation is saved. Now here the impossibility of performing the service from the cause stated is expressly found; for it is stated that the master used every *possible* exertion to supply the deficiency of hands and proceed to sea, but that he could not procure them.

Lord ELLENBOROUGH C. J. having been concerned in the cause gave no opinion.

GROSE J. The question meant to be raised by the special verdict is, Whether under the circumstances of the case it were in the power of the commissioners within the meaning of the charter-party "to mulct or make an *abatement* out of the "freight of the ship," in consequence of her inability to execute the service and proceed on her voyage according to orders? In considering what is the true construction of the charter-party in this respect it is necessary to look to the several provisions and stipulations of the parties in this contract; and then see how those words apply to them. By this charter-party the defendants engaged the plaintiff's vessel in the transport service of the Crown, and the plaintiff engaged to receive all such soldiers, &c. as should be ordered on board, and proceed with them to the places of their destination, and there land them, and so to receive others again and proceed in like manner, till discharged from the king's service. The vessel was to be equipped in a certain manner necessary for such a voyage, and manned in a certain proportion to the tonnage, and it was particularly stipulated that during the service *the whole number of men*, that is of the crew,

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were to be constantly on board : and in order to insure attention to the performance of this, a regular book was to be kept of the entries and discharges of the seamen. For this a certain freight was to be paid for twelve months, provided the ship should not be lost or captured within that period, in either of which events a proportionable sum only was to be paid for the time she was employed : and if she were continued in the service beyond the period mentioned, freight was to be paid according to the rate of other coppered ships, &c. Then comes the proviso in question, that " upon loss of time, breach of orders, or neglect of duty by the master, or from the ship's inability to execute or proceed on the service (not specifying from what such inability might or might not proceed), the commissioners should have liberty to mulct or make such abatement out of the freight as by them should be adjudged fit and reasonable." According to this an abatement might be made for " loss of time," which might or might not be occasioned by the fault of the master ; for " breach of orders," which must be by his default ; for " neglect of duty," which must also be attributable to default ; or for " inability of the ship," which might arise from different causes, from wilful misconduct, or neglect, from necessity, or from mixed causes. The terms used in this last clause are certainly large enough to include causes which might or might not happen from default : and in all these cases the commissioners were to form their judgment, and might mulct or make abatement as they should judge fit and reasonable under the circumstances ; they being constituted arbitrators and judges as between the ship-owner and the public. Upon looking accurately into the charter-party this is not the only instance to be found where the plaintiff by the very terms of his agreement was liable to suffer from the act of God ; for he expressly covenants that the whole number of the crew shall be constantly on board. He took upon himself therefore to keep up a certain number of men at all events, and was therefore bound to provide against the contingency of any of them dying, as by taking an extra number of hands on board. It was no improbable event that disease might take off some in the course of a long voyage ; but if the owner will enter into such a covenant he must provide accordingly. Entries were to be made of the number

number of men on board for the very purpose of enabling the commissioners to see whether the stipulated number had been kept up, that in case of the inability of the ship to execute the service from deficiency of numbers in the crew, they might judge whether or not it were proper to make any abatement in the freight. It may seem hard at first sight that a party should be hurt by the act of God; but as he might covenant to indemnify another against it at all events, so he might agree to refer it to the judgment of the commissioners under view of all the circumstances to say on whom and in what proportion such a loss should fall. (He then stated the several facts found by the special verdict; observing with respect to the desertion of the seamen at *Quebec*.) The desertion of the men might or might not be the cause of the ship's inability to proceed on the service, and it might or might not happen by the default of the master: of that the commissioners were to judge. The fact however of the ship's inability to proceed is expressly stated, which is one of the causes for which by the terms of the proviso the commissioners were to be at liberty to mulct or make abatement in the freight. The case being brought within the terms of the proviso in the covenant they had a right to form their judgment upon it; and if they thought it a fair case for making an abatement, no objection can be made to it. Nothing can be more reasonable than that there should be a fair tribunal to decide between the public and the owner whether the failure of the public service have happened by the default of the contractor, or by accident, whether any abatement should be made in the price to be paid, and if any, to apportion the loss accordingly. The only question here is, Whether this were such an inability of the ship as would give the commissioners jurisdiction to inquire into it, and such for which, within the true intent of the contracting parties, the commissioners might make an abatement? I think it was, and consequently that the defendants were entitled to retain the money so abated.

LAWRENCE J. The question arises on the construction of the clause of the charter party set forth in the special plea, and it has been properly observed that if this were not a case in which the commissioners had a jurisdiction to mulct or make abatement, we cannot take into consideration whether the

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judgment they have formed were the *arbitrium bonorum virorum*; for if they had no *jurisdiction*, their decision, however reasonable, cannot avail. The charter-party has provided for certain cases in which the commissioners are to arbitrate between the ship-owner and the public. The three first cases are put out of the question, which has been argued on the fourth, and it comes to this; What is the meaning of the word *inability* as used in the latter part of the proviso? and if the want of a crew to navigate the vessel be a case within the meaning of the term *inability* as there used? for it is admitted if the true construction of the word *inability* extend to the case found by the special verdict, that the charter-party has given jurisdiction to the commissioners to mulct or make abatement in the freight. This construction is, however, contended against as making the owner an insurer, which he was said not to be in the case of *Hotbam v. The East India Company*; but there is a material distinction between the two cases; for there the question arose in respect of damage to the *cargo*; and in effect it was only said that the *ship-owner* was not an insurer of the *cargo* laden on board. But it is in common experience that the owners of ships are in some sort their own insurers; and to say otherwise in this case would be to make the commissioners themselves insurers of the ability of the ship: Then it is said that *inability* here means some *defect* in the *ship itself*; like a want of sea-worthiness: but a deficiency of the crew is in its effect something like want of sea-worthiness; for an inability to navigate is the consequence of both; and the term *inability* may fairly be taken to mean not only an inability in respect of the tackle and hull of the ship, but also for want of a sufficient crew to navigate her. To give jurisdiction to the commissioners the inability need not arise from any misconduct in the master, but it may arise from accidents at sea, which may render the ship unable to execute the service required of her. And the commissioners are empowered to judge not merely what *mulct* they may impose, but what *abatement* should be made in the specific cases. The meaning of those several terms was that in cases of misconduct they might impose a *fine*, and in cases of mere non-performance of the service required which might happen from accidents they might determine fairly what *abatement* should be made of the sum to be paid by the public in that

that respect. And in the present instance I could not say, if that were for our consideration, that they have judged unfairly in determining that an abatement should be made of half the freight during the time that the ship was lying by at *Quebec* doing no service, and incurring few and trifling expences.

LE BLANC J. The question turns on what shall be considered as *inability* of the ship to execute or proceed on the service. This, it is contended, must arise from some intrinsic defect in the ship itself, or from the default of the master, otherwise the plaintiff is entitled to recover his whole freight. But this could not be the meaning of the parties: for a certain sum was stipulated to be paid for freight for the first twelve months, with a proviso that the ship should not be *lost* or *captured* within that time, in either of which events there was to be an abatement pro rata. So that it is clear that the plaintiff was in some respects to stand his own insurer against loss or capture, either of which might happen without any default, and for which an abatement was to be made. Then in the same clause in which the plaintiff covenants that the ship shall be well apparelled, &c. follows the proviso in question. And the question is, Whether having a crew on board to navigate the vessel be essential to the *ability* of the ship, that is, the ability of the ship to do the thing undertaken to be done by the plaintiff. If the ship be not able to do that for which she was hired, whether that inability proceeded from want of necessary tackle or men, she is equally unable to perform or execute the service. But it is said that this happened from causes for which the master was not in fault. Supposing, however, that from this very circumstance the ship had been lost at sea, it is clear that by the clause before mentioned an abatement would have been made for all the rest of the time for which the ship was engaged. But here it is left to the judgment of the commissioners to determine what proportion of the loss sustained by the non-performance of the service shall be borne by the plaintiff. And the question here merely is, Whether the Forum to which the parties themselves have referred the question of *inability* of the ship had jurisdiction to act in this case? We cannot examine whether their judgment were proper. And if we must, as I think, say that *the want of hands to navigate the ship was an inability of the ship to execute or proceed*

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Judgment for the Defendants.

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DRAKE, Clerk, against MITCHELL and Others.

One of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered; held such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact.

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THE plaintiff declared incovenant against three defendants upon an indenture of demise, whereby on the 27th of April 1797 he leased, bargained, and sold * to the defendants certain coal mines at *Blackbill*, in the parish of *Halifax* in the county of *York*, for the term of one hundred years, with liberty to work the same and carry away the coals for their own use, and sink shafts, &c. *Habeas* to the three defendants, their executors, &c. without paying any rent or consideration for the same to the plaintiff, his heirs, &c. other than the sum of 917*l.* 10*s.* 9*d.*, thereafter covenanted to be paid to him by the defendants, their executors, &c. And the defendants did thereby covenant with the plaintiff, his heirs, &c. that they the defendants, their heirs, executors, &c. should pay to the plaintiff, his executors, &c. the said sum of 917*l.* 10*s.* 9*d.* in full for the purchase and price of the demised coals, mines, &c. by six instalments of 152*l.* 18*s.* 5*d.* the first, on the 13th of July 1798, the second on the second Thursday in July 1799, &c. The declaration then stated that the defendants entered by virtue of the said demise and became possessed of the premises, and alleged a breach by the non-payment of the second instalment.

Plea. As to 41*l.* 16*s.* 2*d.* part of the said 152*l.* 18*s.* 5*d.* that the defendants paid the same to the plaintiff; and as to 111*l.* 2*s.* 3*d.*, the residue, they pleaded that for the payment and in satisfaction thereof the said John Mitchell (one of the defendants), theretofore, to wit, on the 10th of July 1800, at *Halifax*, &c. made his promissory note in writing, dated the same day and year, and then and there delivered the said note to the plaintiff, by which said note he the said John then and there promised to pay, six weeks after date, to the plaintiff or order, 111*l.* 2*s.* 3*d.* value received at Messrs. B. &c. *London* by means whereof, and by force of the statute, &c. he the said John became liable to pay

to the plaintiff the said sum in the said note contained, &c. and being so liable he promised to pay him, &c. (The plea then set forth in like manner a bill of exchange given by the defendant *John Mitchell* to the plaintiff for the same sum, which when presented was refused payment by the drawers); and that the plaintiff, for the recovery of the damages which he had sustained by reason of the non-performance of the said promises and undertakings, afterwards, in *Michaelmas* term 41 *Geo. 3.* sued the defendant *John Mitchell* in *B. R.* in an action on the case on promises; and such proceedings were thereupon had at the suit of the plaintiff against the said *John* in that behalf in the said court, that afterwards, in *Hilary* term 41 *Geo. 3.* the plaintiff, by the consideration and judgment of the Court, recovered against the said *John* 136*l.* 1*s.* for his damages which he had sustained, as well by the non-performance of the said promises and undertakings as for his costs, &c. as by the record thereof remaining in the said court, &c. more fully appears; which said verdict (a) still remains in force and effect, not reversed or annulled. And this, &c.

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The replication took issue on the part-payment of the 41*l.* 16*s.* 2½*d.* in the plea mentioned, and as to the residue of the plea relating to the sum of 111*l.* 2*s.* 3*d.* the plaintiff demurred generally: on which there was joinder.

Dampier in support of the demurrer. The plea is bad, not being pleaded as payment, or as satisfaction; for no satisfaction is averred: but if it were, it would be in satisfaction of damages; whereas the matter is pleaded in bar; and therefore the recovery in the action on the bill of exchange must be insisted on as an *extinguishment* of the debt due under the covenant. But the debt could only be extinguished by following it up to judgment on the covenant out of which it arises; or by taking a remedy for it of a higher nature. The doctrine of extinguish-

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(a) Lord *Ellenborough* observed, that it was not said "which said judgment still remains in force," &c. and asked if his copy of the pleadings were right. *Wood* for the defendant said, that the word *verdict* had been used by mistake: but that was not assigned as special cause of demurrer. Lord *Ellenborough* then observed, that the allegation might be considered as immaterial; the word *verdict* not having been before mentioned.

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ment cannot apply where a party having two remedies, one on one instrument and another on another, follows one only up to judgment: in that case the other is reserved to him; there being no payment or fruit of the judgment recovered. If the note or bill were taken for the money due under the covenant, it could at most only *suspend* the action on the covenant till the day of payment upon the note or bill arrived; but when the day arrived and no payment was made, the plaintiff had his remedy on the note or bill against the one defendant and his action of covenant against all three; and might pursue his remedy on each to judgment, till he had obtained real satisfaction. [Lord *Ellenborough*. Does it necessarily follow that the plaintiff did recover upon the note or bill? It might be upon other promises.] Other promises are mentioned, and the recovery is stated to have been for the said promises and undertakings amongst *other* promises and undertakings by the said *John*, &c. But even taking the recovery to have been on the bill or note, yet those being only simple contract debts could not extinguish the covenant: the remedies still continued concurrent, and judgment on one would not bar the other till the plaintiff had the real satisfaction of payment, and not the fictitious one of judgment. In *McDonald v. Bovington* (a) it was holden that an acceptor of a bill who had been discharged under the Lords' Act from execution in an action at the suit of the holder might afterwards be charged in execution again at the suit of the drawer, against whom the holder had recovered upon the bill in the mean time. Lord *Kenyon* said that having taken the acceptor in execution was a mere formal satisfaction to the holder, not like actual payment. In the case of a mortgage with a bond given to secure the amount, judgment on the covenant is no bar to an action on the bond. So an acceptance of a statute staple for a debt due on a bond is no merger of the bond, though of a higher nature. *Brambwell v. Cornwallis*, cited and approved of in *Higgins' case* (b), contrary to what is said in *Basset v. Wood*, *Lit. Rep.* 17. for which *Dy.* is cited, but no such passage is to be found there (c). Besides, here the parties against whom the plaintiff had his several remedies are not the same, the bill having been given by one only of the covenantors: and

(a) 4 Term Rep. 825.

(b) 6 Co. 44. b. 45. b.

(c) Vide *Dy.* 21 b. pl. 132.

therefore

therefore judgment against the one on the bill, which was not accepted in satisfaction of the covenant cannot be a merger of the covenant by the three. As it is said in the same case of *Higgins* (a), and in *Brown v. Weston* (b), that where two are bound jointly and severally, and the obligee has judgment against one, that is no bar against the other until satisfaction.

Wood contra. Judgment against one of several covenantors for the same debt amounts to an extinguishment of the covenant against all. As to the objection that there is no averment that the bill was accepted in satisfaction of the demand, it is averred to have been given as to 111. 2s. 3d. part of the same, for the payment and in satisfaction thereof; which is not denied, but stands admitted on the record. If it had not been so given, but only as a collateral security for the performance of the covenant, issue should have been taken on that averment. [*Lawrence* J. It should also have been averred in the plea that it was accepted in satisfaction.] If it had been pleaded as accord and satisfaction it must have been so stated; and if nothing had been done upon the bill, it would not have been satisfaction, though pleaded as such: but after proceeding to judgment upon it, it becomes a security of a higher nature, and therefore operates as a merger or extinguishment of the same demand under the covenant; as in *Basset v. Wood* (c). The ground of the case cited from 6 Co. 44. b. 45. b. that a statute staple was no merger of a bond for the same debt, was that the statute was in effect of no higher security than the bond itself, being no more than a bond recorded, and that one bond, whether recorded or not, could not merge another. But a judgment recovered, in whatever form of action, is a security of a higher nature than a covenant; and all judgments recovered are of an equal nature. In *Ashbrooke v. Sagar* (d) it was agreed by all the justices, that if one bound in an obligation promise to pay the money, assumpsit will lie; and if he recover all in damages, this shall be a bar in debt upon the obligation. [*Lord Ellenborough* and *Grove* J. That must mean if he recover payment; it does not say if he merely recover judgment that it will be a bar.] That does not appear: it seems rather from the book that the recovery in damages, which must

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(a) 6 Co. 46. a.
(c) *Lit. Rep.* 17.

(b) *Cro. Jac.* 74.
(d) *Cro. Elia.* 140.

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mean *the judgment*, shall be a bar. And in *Pyers v. Turner* (a), where the son was bound in an obligation to the plaintiff's intestate, and the defendant (the father) promised to pay if time were given him; *Gawdy* J. said that a recovery in that action would be a bar in debt on the bond against the son. [*Lawrence* J. It appears that the judgment for the plaintiff was afterwards reversed in the Exchequer-chamber.] In *Pudsey's* case (b), one being indebted on a simple contract, another gave a bond for the same sum, and held that the contract was determined. As to the objection that the recovery here was had against one only, it cannot avail; for this is a *joint* covenant; and therefore if there had been a recovery against one only upon it, no doubt it would have been a bar to a recovery against the others. And here it is a recovery for the same demand; for the recovery is upon *all* the undertakings and promises laid, which includes therefore those on the note and bill of exchange. In *Parker v. Amy* (c), in debt against two executors, a plea of judgment recovered against one of them as administrator was holden a good bar. So in *Brown v. Wootton* (d), a recovery against one was deemed a good bar to an action of trover against another for the same goods; and though it was there averred that the plaintiff had execution as well as judgment against the first, yet the report in *Yelverton* says that it was further agreed that *the very judgment* was a sufficient bar, for transit in rem judicatam.

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Dampier in reply observed, that in *Brown v. Wootton* the plea not only averred a judgment recovered against the joint executor, but that the plaintiff had his body in execution for the damages recovered: and there too it was observed, that an advantage was gained to the plaintiff by the recovery in the first action, in having his damages ascertained, which were before uncertain. And the distinction was expressly taken by the Court between a case of that sort, and where two were indebted upon an obligation, in which case a recovery against the one was no bar against the other till satisfaction. Therefore the

(a) *Cro. Eliz.* 283.(b) Cited in *Hooper's* case, 2 *Leon.* 110. and said to be adjudged.(c) 1 *Lev.* 261.(d) *Cro. Jac.* 73. and *Yelv.* 67.

case of *Mitchele v. Snape* cannot be law to the extent stated. So in other cases where taking a security from a stranger has been said to discharge the original debtor, they have proceeded on the ground that there was some additional benefit gained to the creditor which operated as a good consideration for his agreeing to release his original debtor. But here no advantage was gained to the plaintiff by taking the note or bill from one of the defendants; and therefore they could only enure by way of collateral security, and not as satisfaction. And though the bill has been followed up to judgment, that is no extinguishment of the debt till a real satisfaction has been obtained. Still less can such recovery against one operate as a discharge of the covenant by all the defendants.

Lord ELLENBOROUGH C. J. I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have. If indeed one who is indebted upon simple contract give a bond or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt; but it is not stated here that the note and bill were accepted in satisfaction, and in themselves they cannot operate as such until the party has received the fruits of them: and then, although they were not originally given in satisfaction of the higher demand, yet, ultimately producing satisfaction, it would be a bar to so much of the present demand. But here they are neither averred to have been accepted as satisfaction, nor to have produced it in themselves; and therefore the matter pleaded is no bar to the action.

GROSS J. The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security; and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant.

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LAWRENCE J. Nothing has happened to alter the situation of the parties in respect of the plaintiff's original remedy on the covenant. It is clear that the bill and note when first given were no satisfaction: and the judgment recovered on the bill is in itself no satisfaction until payment be obtained upon it.

LE BLANC J. The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being purged to judgment, unless it produce the fruit of a judgment.

Judgment for the plaintiff.

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RIGHT, on the several Demises of the Dean and Chapter of
of **WELLS,** against **BARNHAM** and Others.

Under a grant by copy of court roll of a reversionary estate to **A.** (who had before a life estate in the premises) *habendum to him for the lives of B. and C. his grandsons during the life of either of them longest living successively,* according to the custom, &c. reserving a heriot and 6s. rent; **A.** only takes the legal estate in reversion, and not the cestuy que vies, there being no custom to enable them to take; although they were stated to be *admitted* tenants in reversion. And though in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the cestuy que vies to enter as tenant upon the death of his grandfather, and received the 6s. rent from him till his death: yet he not dying *seised* of the legal estate, his widow could not claim her free bench according to the custom. Nor did such receipt of rent from the cestuy que vic constitute a tenancy from year to year, so as to entitle his widow to notice to quit, the rent not being received as between landlord and tenant, but attributable to another consideration.

JN ejectment for lands in the parishes of *Burnham* and *Mark* in the county of *Somerset*, tried at the last Summer assizes at *Wells*, before *Graham B.*, in which there were three demises in the declaration, all from the dean and chapter of *Wells*, the first on the 1st of *August* 1796, the second on the 8th of *June* 1801, the last on the 14th of *April*, 1802: a verdict was found for the lessors of the plaintiff, subject to the opinion of this Court on the following case:

The premises in question are situated in the parishes of *Burnham* and *Mark*, and are a customary tenement, part of the parsonage manor of *Burnham*, and have immemorially been granted and demised by copy of court roll, and have passed and been holden thereby. The lessors of the plaintiff are seised in fee of the manor in right of their church. The custom of the manor has immemorially been to grant such customary copyholds for three lives in one copy, and as many in reversion as the land-

lord

lord and tenant can agree for. At the death of every tenant dying seised of a customary tenement there is due to the lord, for an heriot, the best goods of the tenant so dying; and the widow of such tenant is to enjoy the said tenement during her widowhood. In the year 1705 the premises in question were holden by *Robert Bowden* for his life, with remainder to *Mary* his wife and *Robert* his son, successively. On the 29th of June 1705 *William Bowden*, another son of the said *Robert Bowden* the father, purchased of the lords for a fine of 10*l.* a reversionary interest in the premises in question after the then existing lives: and at a manor court duly holden on the same day the lords granted the following copy: "To this court comes *William Bowden*, son of *Robert Bowden*, and, of the assignment of the said *Robert* the father, took of the said lords the reversion of one tenement containing twelve acres of land or pasture in *Watch-fen*, and four acres of land in the west part of *Broadbarn*, with the appurtenances, within the manor aforesaid, now in the tenure of the said *Robert Bowden* the father, and after him the remainder thereof to *Mary* his wife and *Robert* his son, for the term of their lives successively; to have and to hold the said reversion and all and singular the aforesaid premises with the appurtenances to him the said *William Bowden* and to *Hercules Bowden* his brother, and *Elizabeth Bowden* his sister, for the term of their lives and the life of the longest liver of them, successively, and according to the custom of the said manor, as soon and immediately as the same shall fall in after the death, surrender, or forfeiture of the said *Robert Bowden* the father, *Mary* his wife, and *Robert* the son, by the rents, customs, suits, and services therefore formerly owing and lawfully accustomed, and by the best goods or best beast for an heriot when it shall happen, or three pounds of lawful money at the will and election of the lords aforesaid; and also by the scouring and digging the rivers of the lords aforesaid, when and as often as it shall be necessary as they should be required thereto. And for having such estate and interest in the said reversion of the premises, the said *William Bowden* the son gives to the said lords, for a fine, 10*l.* to them in hand paid: and so as well he, as *Hercules* his brother, and *Elizabeth* his sister, are admitted tenants as in reversion; but their sealty is respited until, and so

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so forth." *William Bawden* paid this fine. After this grant and admission, and before the year 1710, *Robert Bawden* the father and *Robert Bawden* the son died, and *Elizabeth Bawden* had married *Edward Coles* and had two children by him, *Edward* and *Elizabeth*. *Edward Coles* the father, on the 2d of *October* 1710, purchased of the said lords for 9*l.* 10*s.* a reversionary interest in the premises in question after the existing lives, for the lives of *Edward* his son and *Elizabeth* his daughter; and at a court of the said manor, duly holden on that day, the said lords by a copy of that date, according to the custom of the said manor, granted the said reversion of the same premises to *Edward* and *Elizabeth Coles*, the son and daughter, for their lives and the life of the survivor, successively, after the death, surrender, or forfeiture of *Mary Bawden*, *William Bawden*, *Hercules Bawden*, and *Elizabeth Coles* the mother. The copy is similar to that before stated; and on the same reservations *Edward* and *Elizabeth Coles* the son and daughter are stated to take of the purchase of *Edward Coles* the father; the habendum is to the son and daughter; they are stated to have been admitted tenants in reversion, and their fealty respited; *Edward Coles* the father is stated to have paid the fine and did pay it. Before 1748 *Mary Bawden* and *Hercules Bawden* died, and, on the death of *Mary*, *William Bawden*, the purchaser of the copy in 1705 and taker under it, entered into the premises in question under that copy, and was possessed thereof accordingly, and had a son called *Robert Bawden*. On the 4th of *July* 1748 *Robert Bawden* the son of the said *William* purchased of the lords for 13*l.* 14*s.* a reversionary interest in the premises in question, after the then existing lives for his own life; and at a court of the said manor duly holden on that day the said lords by a copy of that date, made according to the custom of the said manor, granted the same to him accordingly; and he is stated in the copy to have been admitted tenant in reversion. He paid the fine. Before 1766 *Edward Coles* the son and *Robert Bawden* the son of *William* died; the latter left two sons, *Robert Bawden* and *William Bawden*. On the 1st *July* 1766 *William Bawden* the grandfather, the taker under the copy of 1705, being then in possession under that copy, purchased of the said lords for 30*l.* a reversionary interest in the premises in question,

question, *after the then existing lives*, for the lives of *Robert Bawden and William Bawden his grandsons*; and at a court of the said manor duly holden on that day the said lords granted the following copy thereof. "*Manor of Burnham.*—The court baron of the worshipful the dean and chapter of the cathedral church of *Wells*, lords of the said manor, holden the 1st of *July 1766*, &c. To this court came *William Bawden*, and took of the said lords the *reversion* of one tenement, containing twelve acres of land and pasture of *Old Anster in Watch-Fen*, and four acres of land in the west part of *Broadbarp*, with the appurtenances, within the said manor, now in the possession of the said *William Bawden and Elizabeth* (now wife of *Edward Coles*, late called *Elizabeth Bawden*) for their lives, and after them to remain to *Elizabeth Coles*, daughter of the said *Elizabeth Coles* for her life; *to have and to hold* the said reversion and premises with the appurtenances unto the said *William Bawden*, for the lives of *Robert Bawden and William Bawden*, sons of *Robert Bawden* deceased, and grandsons of the said *William Bawden*, and for and during the life of either of them longest living, successively, according to the custom of the said manor, immediately after the death, surrender, forfeiture, or other sooner determination of the estate of the said *William Bawden the elder, Elizabeth Coles*, and *Elizabeth Coles* her daughter, of and in the said premises, under the yearly rent of 6*l.* and for an heriot the best beast or best goods, or 3*l.* in money, at the will and election of the said lords when it shall happen, and under all other burdens, works, suits, services, and customs therefore formerly due and of right accustomed. And for such an estate in reversion, so to be had in the said premises as aforesaid, the said *William Bawden the grandfather* gave to the said lords a fine of 30*l.* before-hand paid: and so the said *Robert Bawden and William Bawden the grandsons* are admitted *TENANTS in reversion*; but their fealty is respited, and so forth." *William Bawden the grandfather* paid the said fine of 30*l.* to the lords. *William Bawden the grandfather* continued in possession till the time of his death, which happened in 1771. He left a widow *Mary*, who held the estate for her widowhood. She was possessed of the premises in question till the 4th *July 1795*, when she died. *Elizabeth Coles the mother, Elizabeth Coles the daughter*, and *William Bawden the grandson* died before her.

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Robert Bawden the grandson was married to the defendant *Mary Bawden*, and on the death of his grandmother took possession of the premises in question, and continued in possession till the 6th of *June* 1801, when he died, leaving the said defendant *Mary Bawden* his widow; who thereupon entered the premises in question; and she and the other defendants claiming under her have ever since been and still are in possession thereof. The parsonage of *Burnham*, (exclusive of the manor,) is leased out by the dean and chapter, and the lease is now in existence, and was so at the time of the receipt of rent hereinafter mentioned; and the dean and chapter grant to the lessee of the premises in their lease the reserved rents of the manor, amounting in the whole to 2*l.* 14*s.* a year, and reserve to themselves, on the lease of the parsonage a gross rent of 27*l.* 6*s.* 8*d.* The lessee of the parsonage received under the grant in his lease this 6*s.* rent of *Robert Bawden* the grandson, while he was in possession of the premises in question, after the death of his grandmother, up to *Michaelmas* 1799; and has regularly paid to the deputy of the communitary of the said dean and chapter (which said communitary is annual officer of the said dean and chapter, authorised to receive their money) the rent of 27*l.* 6*s.* 8*d.* reserved by his lease of the parsonage up to the present time. The premises in question are of the value of 50*l.* a-year. No notice to quit has been given to the defendants or any of them. The question (a) for the opinion of the Court was, Whether the plaintiff were entitled to recover? If they were of that opinion, the verdict was to stand; if not, a nonsuit was to be entered.

Dampier for the lessors of the plaintiff. The defendant *Mary Bawden* claims her free bench as the widow of *Robert Bawden*, the grandson of *William Bawden*, under the copy of *July* 1766, whereby *William B.* the grandfather took a reversionary interest

(a) The questions meant to be argued were stated (as required by the rule of court) in the margin of the paper books delivered to the Judges to be. Whether *Robert Bawden* took under the copy of the 1st of *July* 1766, therein stated, such an estate in the premises as to entitle the defendant *Mary Bawden* his widow to a widowhood estate therein? and if not, Whether the receipt of the rents, as therein stated, created such a tenancy as to entitle the defendants to a notice to quit.

to himself (after the lives then in being, of which his own was one) for the lives *of *Robert* and *William Bowden* his grandsons. But, first, no legal estate passed to the cestuy que vies under that grant; for the habendum is to *William* the grandfather only, by whom the fine was paid; and there is no custom found here for the cestuy que vies to take in remainder; without which it is clear from the case of *Smartle v. Penhallow* (a) they can have no right; though none of the other Judges joined with Lord *Halt* in opinion that even such a custom would enable them to take the legal estate, which would then be holden not by the copy, but by the custom. That was a stronger case than this; for there the grant was to *T. N. and his assigns* for three lives, *successive*; whereas here the grant is to *William B.* only. A cestuy que vie is a mere pillar to uphold the estate of the tenant; and as he has not such a feisin as to give to the lord a heriot on his death, so neither has he such as will enable his widow to claim her free bench; both which incidents are essential to the tenant's estate, according to the custom. It might indeed have been considered that as *William Bowden* the grandfather paid the fine for this reversionary interest, he took an equitable estate during the lives of the cestuy que vies, and that if an ejectment had been brought against those claiming under him during that period, the Court of Chancery would have interfered by injunction; but this ejectment was not brought till after the death of both the cestuy que vies in that copy. Secondly, If the cestuy que vies took no legal estate by the words of the grant, and none passed to them by any custom, neither could any such estate pass by their admittance, which was a mere nullity. The lord has no authority to admit otherwise than according to the grant; it is no more than the act of giving possession, which is the consummation of a prior right according to some legal grant, but in itself operates nothing. In *Co. Cop.* 110. and 4 *Co.* 28. b. it is laid down that if *A.* surrender for life, and the admittance be in fee, the estate of the copyholder is according to the surrender, and not according to the admittance; for the lord has only a customary power to make admittance according to the surrender, and if he go beyond that power he acts without a warrant, and then

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(a) 2 *Lord Raym.* 994. 4 *Med.* 63. and *Salk.* 188.

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his act is void. And so if the surrender be absolute, and the admittance conditional, the latter is void and the former good. So if the surrender be to the use of J. S. and the lord admit J. N., this is void, and he may afterwards admit J. S. It is true that in these instances the rights of the tenants were invaded; and here it may be said that the reversionary interest passed from the lords themselves: but the legal reasoning is the same; for in all cases the legal estate, the supposed estate at will, passes from the lord; but it must pass in the way prescribed by the custom, and which requires it to be by copy of court roll, and consequently it cannot pass by any other act of the lord, such as admittance. Thirdly, It may be argued that the receipt of the 6s. rent from *Robt. Bawden*, the husband of the defendant *Mary*, made him at least tenant from year to year, and entitled him and those claiming from him to six months' notice to quit; as was holden in the case of one who became originally tenant of the premises under a void lease (a). But that was a lease at rack rent; and the doctrine has never been extended to the case of a mere conventional rent; for the receipt of such a rent as 6s. cannot furnish any evidence of a tacit agreement between the lord and tenant that the latter shall hold premises worth 50l. a-year as tenant from year to year. The principle upon which the Courts have inferred such a tenancy is that the rent is a compensation for the land; and that both parties have acted upon that understanding. But here the circumstances of the case furnish decisive evidence against such a conclusion. It is clear that neither the lord nor tenant conceived the holding to be on a tenancy from year to year. The tenant did not hold it upon the footing of receiving notice to quit, but upon a claim which such notice could not defeat. Besides, there is an additional reason for not holding it so in this case; for otherwise the tenure would be gone; inasmuch as land holden by copy, if demise by parol but for half a year, can never be granted again as copyhold (b), because it can no longer be said to have been immemorially holden by copy of court roll. The receipt of the conventional rent was consistent with the possession of *Robert*

(a) *Doe d. Martin v. Watts*, 7 Term Rep. 83.

(b) *Lee v. Bootby*, Cro. Car. 521. 6 Vin. Abr. 31. *Douchiff v. Minors*. French's case, 4 Co. 31. a.

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Bawden, without having recourse to the forced inference that he held as tenant from year to year by consent; for he might be said to have an equitable interest in the land, the dean and chapter having received the fine for his reversionary estate; for which reason he was suffered to remain in possession during his life, the dean and chapter considering themselves as trustees for him. But though they waived their legal claim to the possession of the estate during his life, they were entitled to their quit-rent for the same period: and since his death, when they have insisted on their title, they have never received any quit-rent from the widow. But further, upon the facts stated, the chapter cannot be said to have received this individual rent; for what they have received from their lessee of the parsonage has been the gross rent of 27*l.* 6*s.* 8*d.*, which would still be payable though all the copyhold rents were extinct. They ought not therefore to be prejudiced by the mistake of their grantee in receiving their rent from one from whom it was not due. It is not stated that he received it by the order of the chapter, or even that they had notice of it. And in *Wheeler v. Danby* (a), it was said that if a bishop's bailiff of his own head receive rent upon a voidable lease made by the bishop's predecessor, that shall not bind the bishop. If then it would not have confirmed a lease voidable only, à fortiori it will not enure to make a new one.

A. Moore, for the defendants, admitting that a bare cestuy que vie had not such an estate in the land as would entitle his widow to her widow's estate, contended that by the reversionary copy of 1766 *Robert Bawden*, the husband of the defendant *Mary*, did take such an estate. By that grant *Wm. Bawden* the grandfather, who was before possessed of the premises for his life, took a reversionary estate in the same, which must be something beyond what he had before, *to hold to himself, for the lives of R. B. and W. B. his grandsons, and for and during the life of either of them longest living, successively, according to the custom, immediately after the death, &c. or sooner determination of his estate and that of the prior lives, under the yearly rent of 6*s.* and a heriot, &c. when it shall happen: and for such an estate in reversion so to be had in the premises, he Wm. Bawden the grandfather paid a fine of 30*l.*; and so. (the copy says) the said Robt.*

(a) Cited in *Litley* 24. and vide S. C. cited in *Cro. Car.* 65.

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Bawden and Wm. Bawden the grandsons are admitted tenants in reversion. Now all grants are to be construed most strongly against the grantors; and, taking the whole of this together, it appears to have been the intention of the grantors and of the purchaser that the legal estate should be taken by the persons for whose lives it was granted, and whom the purchaser, their grandfather, thereby intended to advance, according to *Ebrand v. Dancer* (a). If supposed to be taken for the life of the purchaser only, the grant was nugatory, he having before an estate for life. Besides, the construction contended for is inconsistent with the sensible and important word *successively*, which must then be rejected, against all reason and authority. And no other meaning can be put upon that word than that the two lives should take the legal estate in succession as named: for it cannot be coupled with the words "to have and to hold to himself" *successively*, which would be a solecism; nor with the subsequent words, "for and during the life of either of them longest living" *successively*, which, as applied to both, is equally a solecism; and if it were only meant that the grandfather's estate should continue during the life of the survivor of the two lives named, then the word *successively* was superfluous and unmeaning. The reversionary estate is to take effect *immediately after the death* of the lives in the prior copy, one of which was the grandfather himself; in which case, if the construction contended for by the plaintiff were the true one, the reversionary interest would determine at the very moment when it was supposed to vest, and consequently could never come into possession; for the limitation is to *Wm. Bawden* only, and not to him *and his heirs*; and as there could be no general (b) occupant of a copyhold before the statute of frauds, there can be no special occupant since. Again, according to that construction the reservation of a heriot was nugatory; for that could only become due on the death of a tenant dying seised. Now a heriot would be due, under the first copy, on the death of *Wm. Bawden*, and as that event is also contended to have determined the reversion, it follows either that two heriots were then due, which is contrary to the custom; or,

(a) 2 *Chanc. Caf.* 16. and 1 *Eq. Caf. Abr.* 382. c. 53.(b) 1 *Roll. Abr.* 511. l. 3. *Ven v. Stowell*, and *Smartle v. Penballow*, *Salk.* 188, 9. 6 *Mod.* 63. and 2 *Ld. Raym.* 1000.

Inasmuch as he could not be said to have died seised of a reversionary estate which was only to commence after his death, no heriot would be due on the last copy, in which it is expressly reserved. The reservation of the heriot, therefore, could only apply to the deaths of the two persons named therein to take successively. Then the two lives being declared to be admitted as tenants of the reversion at the time is strongly indicative of the intention of all the parties. The same observation applies to the reservation of the rent of 6s. But supposing the copy of 1766 could in any event enure to the benefit of the purchaser by the surrender or forfeiture of the prior estate, still it is highly improbable that so exorbitant a fine as 3*l.*, one so disproportioned to the fines in either of the preceding copies, should have been paid for so distant a probability, an interest, if any, depending on so many contingencies. The intention, then, being clear, that the grandsons should take as tenants in succession after the grandfather's death, the Court will give effect to it, unless they are prevented by express authorities. The case relied on, of *Smartle v. Penballow* (a), did not decide that the lives named in the copy could not under any circumstances take the legal estate, if the intent upon the whole appeared to be that they should so take. All that was there ruled was, that even admitting that the grant was only to one to hold to him for his own life and two others, still it was good within the custom for the lord to grant to three to hold to them for their lives successively. *Norton*, the grantee, not being stated to be dead, was presumed to be living; and therefore the question, whether in case of his death the others named could take, could not arise. And in *Brookes v. Brookes*, 2 *Roll. Abr.* 67. *f.* 18. (b), it is said, "If a man surrender a copyhold in fee into the hands of the lord out of court, without limiting any use, which surrender is presented by the homage at the next court, where the surrenderor takes a new copy thereof thus; *the surrenderor cepit de domino extra manus, cui dominus concessit feifinam*, habendum to him and his wife, and the heirs of their bodies begotten, remainder to the right

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(a) *Supra.*

(b) He observed that the opinion of *Houghton J.* in that case, as appeared from the subsequent section (19.) in *Roll. Abr.* seemed to differ from the rest of the Court

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heirs of the husband; the wife shall take an estate tail as well as the husband, *because it appears that it was the intent of the parties and a copyhold is to be expounded, as a will, according to the intent.* For since the surrender was general, and at the next court he accepted this copy, &c. it shews his *intent*, &c. and so it enures by way of explanation of the surrender; and therefore the manner of the grant of the lord is not material." The case is also reported in *Poph.* 126. where the husband is stated to have been admitted at the next court, habendum as before mentioned; and the Court agreed that the wife should take by this admittance, although she were not named in the premises, but only in the habendum; (which is also noted in *Rol. Abr.*;) and they also agreed that though in feoffments and grants the party who was not named in the premises should not take by the habendum (a), yet that the case of a copyhold was like that of a will, in which it was sufficient to pass an estate, though the party were only named in the habendum. In the report of the same case in *Cro. Jac.* 434. the Court are made to say, that "although there were no words of grant in the copy, nor any grant to the wife, but an habendum only, yet it was good enough, for the intent of the lord appeared that both should take." It was also admitted by Lord Holt in *Smartle v. Penhallo*, that when a grant was made to one habendum to him and his assigns during his own life and the lives of two others, the two *cestui que vias* may take in remainder by custom, though named after the habendum. Now the only ground on which a custom can control the grant must be that it interprets the intention of the parties in using such and such words: then if the Court can collect that intention from the acts of the parties themselves, which the authorities warrant them in doing, they are bound to give the same effect to it. Here it appears to have been the intent of the parties that the persons named in the copy should all take successively, paying rent annually, and a heriot upon the death of each taker. In pursuance of this, *Rol. Bawden* was admitted tenant, entered upon the death of the grandmother, who had her widow's estate in the premises, and regularly paid his rent, which was accepted as such. The admittance vested the legal estate in him, as it was said in *Kite* and

(a) See *vide Spyve v. Topham*, ante, 115.

Quinton's case (a), where a surrender out of court upon condition having been presented without the condition, and the surrenderer being dead, the * steward admitted the heir, to whom the surrenderor released by deed; and held well, "because the releasee was admitted, and was copyholder in possession, so that a release of a customary right might enure to him, and he was in by title, scil. by the lord's admittance." It is true that the admittance here was as tenant in reversion; but the legal effect is the same; and at any rate *Robt. B.* was afterwards recognized by the lord as copyholder in possession by the receipt of rent, which is in itself a good admittance, according to *Barker v. Denham* (b), and 1 *Roll. Abr.* 505. l. 26. As to this rent not having been specifically received by the dean and chapter, the receipt of it by their lessee is to all legal purposes the same, and must be presumed to have been with their knowledge and consent. Then the receipt of the rent being at all events an acknowledgment of a subsisting tenancy, entitled the party and those claiming from him to a regular notice to quit, however defective the title might have been by virtue of which he was admitted into possession.

Dampier in reply. No intent of the parties to be collected from collateral circumstances can vary the legal construction of the copy itself, to which alone the legal interests of the parties can be referred; and, therefore, though admittance be necessary to the consummation of a copyholder's title, yet of itself it operates nothing without the substratum of a prior good title to be admitted, derived under some valid and subsisting copy. Then if admittance alone *without* any copy cannot pass the estate, being contrary to the very nature of the tenure, à fortiori an admittance *against* the copy could not have such an operation. Admittance in effect means no more than putting in possession, and where it is spoken of in the books as giving title, it is only with reference to some prior right. Then the acceptance of rent could not confer a better estate than the admittance itself. During *Robt. Bawden's* life, he might be said to have an equitable estate in the premises, and by the same rule the dean and chapter had an equitable right to the 6s. conventional rent; but that ended with his death, and the rent has never been received

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(a) 4 Co. 25.

(b) Sty. 146.

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since. But the widow's estate is claimable only by the custom where the husband died *seised*, and cannot be extended by equity, being in destruction of the tenure.

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LORD ELLENBOROUGH C. J. I know nothing of the circumstances of this case but as they appear stated to the Court, and judging from thence it seems to be against all conscience that this body should have received 30*l.* from a purchaser, who must be supposed to have intended to obtain some valuable consideration for his purchase-money beyond the estate which he before held in the premises, and that they should now insist upon a rigorous construction of their own conveyance, by which it is contended that the purchaser took nothing in addition to his old estate. However, if they will persist in calling for the opinion of the Court, we must not warp the law in order to meet the latent justice of the case: and if a court of equity cannot relieve the defendant under these circumstances she must go without relief; for we cannot give it to her without stretching and violating the rules of law. Without any custom appearing in this manor for the cestuy que vies to take the legal estate in reversion, to be sure the words granting the estate to *William Bawden*, to hold to him for the lives of Robert and William Bawden his grandsons, and the life of the longest liver of them successively, only conveyed the estate to *William Bawden* the grandfather, during the lives of the persons so named. Had such a custom been stated, it might have had the effect of passing the estate to the other persons named: but without it I cannot say that they took the reversionary estate under the words of the copy. Then if they could not take under those words, as little can I say that the bare admittance conferred an estate according to the custom of the manor, so as to give the widow of *Robert Bawden* an estate for her life, by virtue of the seisin of her husband. For, giving the admittance its utmost effect, it could only give the tenant an estate at will, or at most for life; but could not create such an estate as would survive to his widow, which could only arise out of the copyhold, according to the custom. Neither can we refer the payment of the 6*s.* rent by the husband to a holding as tenant from year to year, because it expressly appears to have been paid on another account and a different consideration, to which it must be attributed. On no ground therefore can the widow

widow be entitled to retain possession against the legal title of the lessors of the plaintiffs.

GROSE J. The only question before us is, Whether the widow be entitled to her free bench, which is an excrescence arising out of a copyhold estate from the seisin of the husband? Now she cannot be so entitled, because, according to the known law of copyholds upon a grant like the present to *William Bawden*, to hold to him for the lives of two others, and the longest liver of them successively, *William Bawden* only was seised of the estate, and not the cestuy que vies, of the survivor of whom the defendant *Mary* was the widow. Then as to the admittance, it is clear that that could not operate to give her husband an estate, if the copy did not, according to the custom. And it being apparent in what character the husband held, and on what account the annual payment of 6s. was made, we cannot consider it as creating an agreement for a tenancy from year to year.

LAWRENCE J. I should have been glad to have found any ground upon which we could have given judgment for the defendant; for on the case before us there can be no doubt but that at the time of the reversionary grant, for which 30l. purchase-money was given, it must have been intended to pass the estate to the new lives with all the advantages which the custom would give them, amongst others, the right of the tenant's widow to enjoy the estate after his death. But the case before us is one where there is no custom stated to warrant the cestuy que vies in remainder in taking any estate under the copy. The copy in the terms of it operates only as a grant to *William Bawden* the grandfather for the lives of other persons, which to be sure was as to him a perfectly nugatory grant. On the question of the tenancy from year to year, I do not think we can infer from the payment by *Robert Bawden* of the customary rent of 6s. that there was a contract between him and the dean and chapter that he should hold as tenant from year to year. It was paid and received altogether on another account.

LE BLANC J. To be sure *William Bawden* the grandfather would never have paid his money for such a grant as this if he had understood what it really was: for it is no more than a grant to him to hold during the lives of others, which conveyed

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no eſtate to them, as was probably the intention of the purchaſer. And though they were afterwards admitted as tenants in reverſion, yet I cannot ſay that ſuch admittance would extend the grant, ſo as to convey the legal eſtate in reverſion to them. Then as to the queſtion of tenancy from year to year, the payment of rent cannot be evidence of a holding from year to year, if, as in the caſe of a conſentary rent like this, it be not a payment of rent as between landlord and tenant.

Poſtea to the leſſors of the Plaintiff.

Friday,
Feb. 4th.

DOE on the ſeveral Demiſes of GARNER and BALLANTINE
againſt ISABELLA LAWSON, MARY WILSON, and NORMAN
BROUGH.

One deviſes
to his natural
ſon, and in
caſe of his
marriage
with certain
perſons, or
his dying
without iſſue,
then to his
nephew for
life, and after
his deceaſe
then for and
amongſt ſuch
perſon and
perſons, his
and their
heirs. &c. as
ſhall appear
and can be
proved to be
his next of kin,
in ſuch pro-
portions as
they would by
virtue of the
ſtatute of diſtributions have been entitled to his perſonal eſtate if he had died inteſtate: held
that the diſtribution was to be made amongſt thoſe who were the teſtator's next of
kin at the time of his death, though the nephew, to whom a prior life eſtate was given,
were one of them.

EJECTMENT for an undivided third part of certain freehold
premises in the pariſh of *Wigton* in the county of *Cumber-
land*. The defendants defended ſeparately for different parts of
the premises. The cauſe was tried before *Chambre J.* at the laſt
aſſizes for the county of *Cumberland*, when the jury found a
verdict for the defendant *Mary Wilson*, as to ſuch parts of the
premises as ſhe defended for; but found a verdict for the plain-
tiff as to ſuch part of the premises as the defendants *Iſabella
Lawson* and *Norman Brough* defended for, ſubject to the opinion
of the Court upon the following caſe:

Isaac Wilson, being ſeiſed and poſſeſſed of divers freehold, cuſ-
tomary, and leaſehold eſtates in the county of *Cumberland*, of
which freehold premises the premises in queſtion are part, by his
will duly executed, dated the 29th of *January 1790*, deviſed all
and every his freehold * meſſuages, lands, &c. in *Wigton* or
elſewhere in *Cumberland* (except his freehold land at *Dundraw*
after mentioned) to his nephew *Joſeph Wilson*, and his friends
Mungo Glaiſter and *William Ballantine*, and the ſurvivor of them,
and to the heirs of ſuch ſurvivor, in truſt that they or the ſur-
vivor, &c. ſhould immediately after his deceaſe receive and take

the rents and profits of the said premises, and apply one moiety thereof unto the testator's natural son *John Lawson* or his assigns, until he should intermarry with any person (except as after mentioned), viz. upon this condition precedent, that upon his marrying with any woman except the daughters of *Joseph Ismay*, then in trust after such marriage (except as before excepted) for the said *J. Lawson* and his assigns for life, without impeachment of waste, but to permit him or them to receive and take the rents, &c. remainder to the trustees to preserve contingent remainders, remainder to the issue of the body of the said *John Lawson* upon the body of any woman he shall take to marriage (except any of the daughters of the said *J. I.*) and to the heirs of such issue: but in default of such issue, or in case the said *John Lawson* should intermarry with any of the daughters of the said *J. I.* then and in either of such cases, and from and immediately after either of such events (whichever of them should first happen), then and thereupon he devised the said premises unto his said nephew *Joseph Wilson* for life; remainder to the said *M. G.* and *W. B.* during the life of the said *Joseph Wilson*, in trust to preserve contingent remainders; but to permit him to receive the rents, &c. "and from and after the decease of the said *Joseph Wilson*, then I give and devise the said premises unto the said last mentioned trustees and their heirs, *for and amongst such person and persons*, and to his and their several and respective heirs as tenants in common and not as joint tenants, *as shall appear and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the statute of distributions have been entitled to my personal estate, if I had died intestate*, and to and for no other use, intent, or purpose, whatsoever." Then reciting that he was possessed of and entitled to divers customary estates in *Cumberland*, held in trust for him and his heirs, or of such other person or persons as he should by his last will, or by any deed, &c. appoint; he thereby appointed the several trustees, &c. to stand seised of the said customary estates for the same uses, trusts, &c. as his freehold estates before devised; charging, nevertheless, the said freehold and customary premises with one annuity of 5*l.* to his sister *Martha Willis*, and another of 40*s.* to *E. P.* He then devised to the said *J. Wilson*, *M. Glaister*, and *W. Ballantine*, their ex-

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cutors, &c. his leasehold estate at *H.* in trust to apply the rents, or to sell the premises, and place out the money at interest, and to pay and apply such rents or interest, and divide the premises or purchase-money arising therefrom to and amongst such person or persons, for such periods and in such proportions as the said freehold and customary premises, and the rents and profits thereof, were therein before limited and devised. He also devised to the said *Joseph Wilson* in fee all his freehold land at *Dundraw*. He then bequeathed to the said *J. Wilson*, *M. Glaister*, and *W. Ballantine*, their executors, &c. all his stock in trade and household goods and furniture in his dwelling-house, &c. in *Wigton*, in trust to permit the said *John Lawson* to take possession of the said stock in trade, and carry on the same trade as he the testator had usually done there, for one year next after his decease; and also to have the use of the furniture there. And if during that one year *John Lawson* should conduct the said trade to the approbation of the trustees, the testator willed that the same should then become his absolute property; otherwise the trustees then should have the right to resume possession of and sell the said stock in trade, and the money arising therefrom to constitute part of his personal estate, applicable to such purposes as were thereby bequeathed. And the trustees were to permit the said *John Lawson* to enjoy the use of the furniture as long as he chose to keep house, and until he should marry; and after his marriage (other than with the daughters of *J. I.*) the said furniture to become his own property. But if he should marry with any of the daughters of *J. I.* the trustees might take possession of the furniture and sell it, and the money to be considered as part of his personal estate, subject to the disposition of his will. All the residue and remainder of his estate and effects, of what nature or quality soever, he gave and bequeathed as follows, viz. "one moiety to be divided betwixt the said *John Lawson* and *Joseph Wilson*, and the other moiety thereof to be divided amongst my next of kin according to the statute of distributions." And he appointed the said *Joseph Wilson*, *Mongo Glaister*, and *William Ballantine* joint executors.

The testator *Isaac Wilson* died the 6th of February 1790, leaving his trustees *Joseph Wilson*, *M. Glaister*, and *W. Ballantine*, as also his natural son the said *John Lawson* surviving him. At the time of the testator's death his next of kin under the statute

tute of distributions were the said *Joseph Wilson*, his nephew and also his heir at law, being the son of *Jonathan Wilson*, the eldest brother of the testator, who died in the lifetime of the testator; another *nephew, *John Wilson*, only child of the testator's second brother *Job Wilson*, which *Job* also died in the testator's lifetime; and the testator's sister *Martha Willis*. After the testator's death the trustees entered into possession of the premises in question, and paid a moiety of the rents and profits to the said *John Lawson* according to the directions of the will, until the time of his marriage after mentioned. The said *Joseph Wilson*, one of the said trustees and the testator's nephew and heir at law, died without issue on the 17th of *April* 1791, and before the marriage of the said *John Lawson* after mentioned, leaving the lessor of the plaintiff *Joseph Garner* then an infant, his the said *Joseph Wilson*'s nephew and heir at law, being the son of his the said *Joseph Wilson*'s sister, who married *Joshua Garner* and died in the testator's lifetime, leaving one child only, viz. the said *Joseph Garner*, and the said *Joseph Garner* then also being heir at law to the said testator *Isaac Wilson*. The said *Joseph Wilson* made a will, and appointed *Mary* his wife executrix thereof. The said *Martha Willis*, the testator's sister, died after the testator's death on the 29th of *May* 1791, and before the marriage of the said *John Lawson* after mentioned, leaving several children surviving her, viz. *Jonathan Willis*, *Thomas Willis*, *Joseph Willis*, *Martha* who married *Joseph Saul*, and *Milcab* who married *John Martindale*, and who were alive at the time of the marriage of the said *John Lawson* after mentioned, as was also the said *John Wilson*, the testator's other nephew hereinbefore mentioned. By indentures of lease and release and assignment, dated the 15th and 16th of *February* 1794, made between *Mary Wilson*, widow and executrix of the said *Joseph Wilson*, the said *John Wilson*, *Jonathan Willis*, *Thomas Willis*, *Joseph Willis*, *Joseph Saul* and *Martha* his wife, and *John Martindale* and *Milcab* his wife, of the one part, and the said *John Lawson* of the other part; in consideration of certain sums of money therein mentioned to them respectively paid, they granted, released, and assigned to and for the use of *John Lawson*, his heirs, &c. all and every the said freehold, customary and leasehold premises. On the 21st of *January* 1795, the said *John Lawson* named in the will of the said testator intermarried with *Isabella Ismay*, one
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of the daughters of the said *J. I.* mentioned in the will of the said testator *Isaac Wilson*, and in *March 1801* the said *John Lawson* died, leaving the said *Isabella* his widow and several children by her surviving him. The said *Joseph Garner* the lessor of the plaintiff attained the age of 21 years on the 28th of *June 1799*. The said *M. Glaister*, one of the trustees named in the will of the testator *Isaac Wilson*, died since the death of the testator. The question (a) for the opinion of the Court was, whether the plaintiff were entitled to recover; and if the Court should be of that opinion, then the verdict to remain for the plaintiff as it now stands: but if the Court should be of opinion that the plaintiff was not entitled to recover, then a verdict to be entered for the defendants *Isabella Lawson* and *Norman Brough*.

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Littledale, for the plaintiff, contended that by the devise to the trustees, upon the event of *John Lawson's* dying without issue, or marrying one of the daughters of *I. Ismay*, (which latter event took place,) "*for and amongst such person and persons and their several heirs, as tenants in common, as shall appear to be my next of kin, in such parts and proportions as they would by virtue of the statute of distributions have been entitled to my personal estate if I had died intestate,*" must be intended of such persons as were his next of kin at the time of the testator's death, and not such as were his next of kin at the time when the contingency happened; because the former were the persons who by the statute of distributions, to which express reference is made by the testator, were alone entitled to take a distributable share of his personalty; and no others can answer the whole description contained in the will. This is the obvious sense of the words. And in *Ellison v. Airey* (b) Lord Hardwicke said, "the Court generally takes it that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being unless the testator shews his intention to be such by the words in the will." Now here, after the limitations in favour of *Lawson* are at an end, the testator reverts to his own relations; and it is more natural that he should prefer those who

(a) Lord *Ellenborough* complained that the rule of Court was not sufficiently attended to, in not stating in the margin of the paper-books sent to the Judges the points intended to be made in argument.

(b) 1 *Vesf.* 114.

were

were his next of kin at his own death, whom he knew, and whose descendants might take from them, than that the first takers should be such as were in a remoter degree of relationship, and perhaps not in esse at his death: and this is the more probable, as a different construction would exclude the representatives of *Joseph Wilson* his heir at law at the time of his death, and who was a particular object of his bounty. Supposing there had been no limitation at all to *J. Lawson*, there could have been no doubt but that the *next of kin* meant such as answered that description at the testator's death: then the intervention of that distinct limitation cannot vary the construction as to the description of persons to take afterwards. If it be said that this is either a contingent remainder or an executory devise, and therefore the vesting of it was to be postponed till the limitation over took effect; though that might be a reason why the interest should not vest in the particular persons, it is no reason why the description of persons who were capable of taking should vary from time to time. In *Rayner v. Mowbray (a)*, where a residue was bequeathed to be divided amongst those who were *related* to the testator, the Lord Chancellor held that it was to be confined to those who were entitled to share under the statute of distributions; and that though the distribution were deferred till after the death of the testator's wife, to whom the estate was first given, and the subsequent sale of it, yet that did not prevent the interest from vesting at the death of the testator. The like construction prevailed in *Masters v. Hooper (b)*, where the testator gave a residue to *A.* for life, remainder to *B.* for life, and *after his decease to be divided amongst all his relations* share and share alike. There the contention was between those who were the next of kin at the time of the testator's death, and those who were such at the death of the second taker; and held that the former were entitled as in the case of an intestacy. The same opinion was intimated by the Lord Chancellor in *Philips v. Garth (c)*, but that was ultimately compromised. All these cases were so much the stronger than this, because there was no direct reference by the testators themselves to the statute of distributions as in this case. In some cases indeed where the limitation over has been to *children* generally, it has been holden to include

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(a) 3 Bro. Chan. Caf. 234. (b) 4 Bro. 307. (c) 3 Bro. 70.

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such as had come in esse after the testator's death, and before the limitation over took effect. *Ellison v. Airey* (a) and *Baldwin v. Karver* (b), went upon that principle. But there they come within the same general description of *children*; the same class of persons still take who were the objects of favour; they are all in the same degree of relationship to the testator; and there is this further and essential distinction between that and the defendant's case, that though the limitation be enlarged by construction to include those who were not in esse at the testator's death, yet no person is excluded who was more nearly related to him, and who was once within the description at that period. And in *Devisme v. Mello* (c), where stock was left to L. for life, and in case he did not leave children, to revert to W.'s children in equal parts; a daughter of W.'s who was living at the time of the bequest made, and survived the testator, but who died before L. was holden to have a vested interest which was transmissible to her representatives upon the death of L. without children. There is another class of cases depending on the future execution of powers, in which case the distribution is necessarily confined to those who are capable of taking at the time of the power executed: but these are clearly distinguishable; for there the testator transfers the power of selecting the objects of bounty from himself to the person to whom the power is given, and who consequently has a personal discretion to exercise within the limits assigned by the power. Of this nature were the cases of *Harding v. Glyn* (d), and *Attorney-General v. D'Oyley* (e). But these were cited in the argument of *Masters v. Hopper* before mentioned, and must therefore have been thought by the Lord Chancellor not to apply to a case like the present. Here then *Joseph Wilson* took a remainder in fee in one-third part of the premises, which descended to the lessor of the plaintiff as heir at law.

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Wood, contra, contended that the meaning of the testator was to postpone the distribution till the limitation over took effect upon the happening of the contingency of *J. Lawson's* marriage with *J. I.'s* daughter, at which period the interest was to be shared according to the statute of distributions, by which the

(a) 1 Ves 114. (b) *Comp.* 309. (c) 1 Bro. Cb. Cas. 537.
 (d) 1 Atk 459. (e) 4 Vin. Abr. 485. pl. 16.

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latter words would be satisfied as well as by the other construction; and that was the only way in which *all* the words could be satisfied; for the distribution was to be made amongst such persons as after the happening of the contingency should *then* appear to be his next of kin. The word *then* is not indeed inserted in that order of the words as they stand in the will, but it is inserted in the preceding part of the sentence, and must necessarily be so understood according to the grammatical construction of it. For in default of issue of *Lawson*, or in case he should intermarry with any of the daughters of *Joseph Ismay*, *then* immediately after either of such events as should first happen, the devise over to *Joseph Wilson* is to take effect; and from and after his decease, *then* he devises over to trustees for and amongst such person and persons as should appear and could be proved to be his next of kin, &c. The period when such proof was to be made is therefore fixed to be after the happening of those events. At the time of making the will there could be no question who were the testator's next of kin, and if he had meant to give the residue to his sister and his two nephews he would have expressly named them, as he did in other parts of his will: instead of which, by giving it to *such person and persons as shall appear and can be proved to be his next of kin*, it is clear that he meant to refer to a future period, till when it was uncertain who would then be his next of kin. The word *shall* in itself implies a future time; and this is confirmed by the uncertain description of the *person or persons* who would then be entitled to take as next of kin. Now at the time of *John Lawson's* marriage the testator's next of kin under the statute of distributions were *John Wilson* and the children of *Martha Willis*, which would exclude the lessor of the plaintiff *Joseph Garner*, who claims under *Joseph Wilson*, who died before the contingency happened, namely, that of *Lawson's* marrying one of *Ismay's* daughters, on which alone he was to take. It is not probable that if the testator meant that his nephew *Joseph Wilson* should take a vested fee in one third, he should first have given him an estate for life in the same. In *Worsley v. Johnson (a)*, where the question was whether the testator's wife should be included in the term *relations* to whom the

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(a) 3 Atk. 753 761.

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remainder over was devised, Lord *Hardwicke* decided in the negative, for this, amongst other reasons, that an express estate for life was before given to her. And in none of the cases cited was there an antecedent life estate given to the party who was afterwards to take any share of the remainder in fee. Nor were there any such words in *Ragner v. Mowbray* (a) as here, fixing the distribution of the residue to take effect at a certain future period when it was to be proved who were entitled under the description. Every case of this sort is a question of intention, depending upon the particular provisions of the will, and cannot be governed by any other not exactly like it.

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Littledale in reply observed, that in *Masters v. Hooper* (b) the testator's nephew took an estate for life, and yet his representatives after his death were decreed to take a distributive share in the remainder over : and that nothing was more common both in wills and settlements than for one to take an estate for life, to whom afterwards a contingent remainder in fee was limited which would go on his death to his representatives. In *Worsley v. Johnson* (c) the question was, whether the testator meant in the word *relations* to include his wife ; for it was clear that strictly speaking she was not included in that term, but would take under the statute of distributions eo nomine as *wife*, and not as a *relation* ; the naming her therefore before in a distinct provision for her life was a circumstance against such an intention. But here the import of the descriptive words used is plain, and the only question is as to the period of time when the description shall attach. And therefore the circumstance of a prior estate for life given to *Joseph Wilson* does not shew an intention to exclude him from a description of persons within which he properly came. With respect to the testator's not having expressly named his then next of kin, as he might have done if he had so intended ; as he meant to refer to a future period, namely, that of his own death, before which alterations might happen by the deaths of his near relations, the description was necessarily uncertain as to the individuals to whom he meant to extend his bounty at that period, which sufficiently accounts for the general wording of the residuary clause. The

(a) 3 Bro. Chan. Caf. 234.

(b) 4 Bro. Chan. Caf. 207.

(c) 3 Atk. 758.

word *then*, which is said to be understood, is not to be found in that part of the clause on which the argument is founded; and therefore * differs this very materially from the cases of *Long v. Blackall* (a) and *Green v. Howard* (b), where it was applied to those persons who should at a certain period or event be *then* living.

Lord ELLENBOROUGH C. J. The case is sufficiently clear not to require any further argument (c). The question is, whether by the words *next of kin*, &c. as here used, the testator meant such as should answer that description when the limitation over was to take effect, that is, in case of *John Lawson's* marriage with any of the daughters of *J. Ismay*, or of his death without issue, or whether the testator meant such as should be his next of kin at the time of his own death. The limitation over is to "such person and persons, &c. as shall appear and "can be proved to be his next of kin in such parts and proportions as they would by virtue of the statute of distributions have been entitled to his personal estate if he had died intestate." Now when would they have been entitled to his personal estate if he had died intestate? At the time of his death. Then the distribution must be made at such a time as will best meet the words of the will, which is at his death, when the title by intestacy accrues; and must therefore be made amongst those persons who would then have been entitled to share if he had died intestate, or to their representatives. As to the words of description used being in the future; words to postpone the vesting in possession of an interest are naturally prospective. It could not be clear to the testator himself who would take under the description at the time of his death, nor would it so appear to the trustees till after *Wilson's* death and inquiry made. This I think is the plain and natural meaning of the words. But this construction is also supported by the case of *Rayner v. Mowbray* (d). There the distribution was not to take effect till after the death of the wife, but yet it was referred to such persons as would have been entitled to share at the death of the testator

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(a) 3 Ves. jun. 486.

(b) 1 Bro. Chan. Caf. 31.

(c) This was prayed by the plaintiff's counsel, if the Court had any doubt.

(d) 3 Bro. Chan. Caf. 234.

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under the statute of distributions. And there too the proof of relationship was to be made after the determination of the life estate, and for six months after the subsequent sale of the property. The same objection might be made there as here, that the inquiry was to be made at a future time; but still it was holden to relate to such as were entitled at the time of the testator's death. It is true that there did not occur in that case the giving of an estate for life to one who was also entitled to a share of the remainder over in fee: but I see no inconsistency in that, at least not sufficient to get rid of the plain meaning of words.

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GROSE J. Rules for construing wills are laid down as the best method for getting at the intention of a testator. The case of *Rayner v. Moubray* furnishes a rule of this sort, founded in good sense; and it applies so closely to the present that only one distinction has been attempted to be made between them; and that one, I may say, has been answered by the other case of *Masters v. Hooper*, where an estate for life was previously given to the party, through whom a share of the remainder over was claimed. And nothing is more common than that an estate for life should be given to one to whom a remainder over in fee is afterwards devised. Great stress has been laid on the words "as shall appear and can be proved," &c. But the omission of the word *then*, which has occurred in other cases, shews that the trustees were not to look to the persons who should be the testator's next of kin at the time when the contingency happened, but according to the plain meaning of the words used to such as were his next of kin at the time of his death, who alone were entitled to take by the statute of distributions in case of his intestacy.

LAWRENCE J. The question is, What was the intention of the testator in adopting the words he has used? As to which, I do not know how the construction put upon different expressions used in other wills can apply, unless where the cases have laid down some general rule of construction, from whence the intention of a testator in other cases falling within the same rule may be collected. It has been urged in argument, that if the testator had intended to devise the remainder over to such as were his next of kin at the time of his death, he would probably have described them by name. Perhaps his not having so done may have introduced some doubt, and his meaning might have been cleared

clearer if he had so expressed himself: but in fact he does describe the same persons in another manner. The persons to whom the remainder over is limited are to take in such proportions as *they would by virtue of the statute of distributions* have been entitled to *if he had died intestate*: that, therefore, must refer to persons who were his next of kin at the time of his death. The case of *Worsley v. Johnson* has been well answered by the plaintiff's counsel. The word *relations* was there used in an equivocal sense, and Lord *Hardwicke* adverted to the circumstance of a prior estate for life having been given to the wife merely as an argument to shew that she was not meant to be included in that description. But here there is no doubt that the next of kin at the testator's death come under the description of persons to whom the remainder over is limited. And the case of *Masters v. Hooper* applies to shew that they may take as such, though an estate for life be antecedently given to one of them.

LE BLANC J. The contingency on which the remainder over was to take effect was either the marriage of *John Lawson* with one of the prohibited persons, or his death without issue; in either of which events the premises were first devised to *Joseph Wilson* for life, and then over. *Joseph Wilson*, it appears, died before *Lawson's* marriage, who afterwards married one of the prohibited persons. At the time of making the will it was uncertain whether either of these events would take place, and therefore the testator directs the division of the remainder over amongst those persons who *should appear and could prove themselves* to be his next of kin. But then the question is, To what period the inquiry should refer? Now even if the word *then* had been inserted in the place where it is contended that it must be implied, I am not clear that the clause would not still have been in favour of the plaintiff: for though the distribution had been directed to be made amongst such persons as should "*then* appear," &c. it would refer as well to the time *when* the inquiry was to be made, that is, when it became necessary to make the inquiry upon the happening of the contingency on which the limitation over was to take effect: but still the inquiry being directed to be made of such persons *as would by virtue of the statute of distributions have been entitled to the testator's personal estate if he had died intestate*, that must refer to the time of

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his death. And it appears by the authority of *Rayner v. Mowbray*, and *Masters v. Hooper*, that the words *next of kin* of the testator are to be referred to the time of his death. Therefore, both upon authority and upon the plain import of the words themselves here used, we must construe them in the same manner.

Postea to the Plaintiff.

Friday,
 Feb. 4th.

CAMPBELL against WILSON.

Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above 20 years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 26 years, as all former ways were at that time extinguished by the operation of an inclosure act.

IN trespass, the declaration charged the defendant with breaking and entering the plaintiff's close called *Bryan Grey's Moss Dale*, otherwise *Dr. Campbell's Moss Dale*, in the parish of *Warton* in the county of *Lancaster*. The defendant pleaded not guilty as to the force and arms, &c.: and as to the residue he pleaded, 1st, a prescriptive occupation-way from a lane called *Storr's Lane* over the locus in quo to a moss dale of the defendant's, at all times and with carriages, &c. which prescription was traversed by the replication, and issue taken upon it. 2dly, The defendant pleaded that *Bryan Grey* was seised in fee of the locus in quo, and that one *Joseph Wilson* (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining *Moss Dale*, and that by deed (lost by time and accident) *Bryan Grey*, in consideration of a competent sum, granted to *Joseph Wilson* and his heirs a way from the said *Storr's Lane* into, through, and over the locus in quo to *Joseph Wilson's* last-mentioned moss dale at all times, &c. for the occupation of the same moss dale. The replication traversed the grant, on which issue was taken; and also made a new assignment, to which the defendant pleaded not guilty.

• At the trial before *Chambre J.* at *Lancaster*, the only question arose on the right of way; the plaintiff contending that the defendant's right depended solely upon an award made under an inclosure act of the 17 Geo. 3. c. 79., and that the way into *Storr's Lane* allotted to him under that award was over an adjoining piece of ground, formerly belonging to one *Whinroy*,
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and not over the locus in quo. A printed copy of the act was given in evidence by the plaintiff, whereby it appeared that certain commissioners were appointed for dividing and inclosing the commons, wastes, and two mosses, within the manor of *Yealands* in the parish of *Warton*; and the commissioners were to set out (a) all proper public highways, and also private ways, over the inclosures: and it was provided that after the making such public and private ways it should not be lawful for any person to use any other public or private ways than such as should be so set out. By another clause (b) the commissioners were required to make an award in writing, specifying the several allotments made, and the public and private ways set out; which award was to be conclusive upon all parties. And by another clause (c), after such award made, all former rights, interests, easements, claims, and demands whatsoever upon any of the said commons, mosses, &c. were for ever barred and extinguished. The award made under the act, dated 18th of *December* 1778, and inrolled 12th of *January* 1779, was then proved, in which were described five moss dales, (or inclosures out of one of the mosses), one of which was the locus in quo, running parallel to each other, and bounded on the north by *Storr Lane*, and on the south by certain other inclosures, in respect of which so many respective occupation-ways were claimed over the five moss dales; over one of which five, namely, *Thomas Whinray's Moss Dale*, an occupation-road was assigned to *JOHN Wilson* (by mistake for *JOSEPH Wilson*, the person under whom the defendant claimed) to go to and from *Storr Lane* to his the said *John Wilson's Moss Dale*; and over the locus in quo therein called *Bryan Grey's Moss Dale* was assigned another similar occupation-way to *JOSEPH Wilson* (by mistake for *JOHN*), in right of another close to the south adjoining and parallel to the defendant's close. The rest of the evidence on either side consisted principally of user of the several occupation-ways by this or that occupier of one or other of the closes which lay to the south of the five moss dales first mentioned in order to communicate with *Storr Lane*. But the result clearly was, that the occupiers of the defendant's close had always used the occupation-way over the locus in quo for upwards of 20 years, and indeed before the making of the

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(a) Fo. 7 of the act. (b) Fo. 12, 13. (c) Fo. 14.

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award; and that they had not used the way which had been set out for the defendant's estate by the award, and which led over *Whinray's Moss Dale*. And, except for a period of about a year or two, (which happened about 18 or 19 years ago,) when there was a union of occupation of the plaintiff's and defendant's close, the evidence went to shew that this user of the way over the plaintiff's close by the occupiers of the defendant's close was adverse; for when, about 14 years ago, a ditch was cut between the plaintiff's and defendant's close, a piece was left uncut for the defendant's tenant to pass over into the plaintiff's moss dale; and when the latter was ploughed, room enough was left for a road to communicate with the defendant's close; and when some turf was set in the way, it was twice removed by the defendant's servants. And no leave was proved to have been at any time asked by them, nor was any interruption insisted upon till about two years ago. This evidence was insisted upon by the defendant's counsel as establishing an uninterrupted adverse enjoyment of the way for 20 years and upwards before the action brought, which they relied upon as a ground for the jury to presume the grant pleaded by the defendant in his last justification. The learned Judge, in summing up the evidence, observed to the jury, that it seemed probable that the defendant's enjoyment of the way over the plaintiff's moss dale after the award might originate in mistake; but that however that might be, if they were satisfied that the enjoyment was adverse, and that it had continued 20 years and upwards before the action, it was a sufficient ground for their presuming the grant pleaded by the defendant. That the use of a road as a matter of right by those who claimed it, and submitted to as a matter of right by the possessor of the land over which it was used, was to be considered as an adverse enjoyment. That if they believed the defendant's witnesses, the possession was adverse, not having been interrupted, and being attended with other circumstances to shew how the parties themselves understood it, particularly in the instances of the defendant's people removing the turf which obstructed the way, and leaving in the ditch, which was cut between the plaintiff's and the defendant's close, a solid piece of ground uncut, for no other use than to admit of the passage for the defendant's carts into the locus in quo. And as another circumstance, the non-
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user of the defendant's right of way over *Whinray's* close under the award. But that if the jury were satisfied from the whole of the evidence that the defendant's enjoyment had been only *by leave or favour, or otherwise than as under a claim or assertion of right, it would repel the presumption of a grant*, and in that case, or if they thought it had not been enjoyed adversely for 20 years, they must find for the plaintiff. The jury found for the defendant. And a rule having been obtained for setting aside the verdict, on the ground of a misdirection of the Judge in telling the jury that they might presume a grant of the right of way from an adverse user of it for above 20 years *though originating in mistake*.

Cockell Serjt. and *Wood* now shewed cause, and contended that, taking the whole report of the learned Judge together the question was fairly left to the jury, Whether they would not under the circumstances presume a grant? and they accordingly, by their verdict, made that presumption. And it would be no impeachment of such grant, if made, that the first user of the road had been by mistake, which it might be the object of the grant afterwards to correct. But there was no evidence to shew that the way had ever been used by mistake or by favour; but, on the contrary, it was always insisted upon as an adverse right, and as such submitted to by the plaintiff and those under whom he claimed. In *Holcroft v. Heel* (a), where the grantee of a market had suffered another to erect another market in his neighbourhood, and use it without interruption for above 20 years, *Ld. C. J. Eyre* thought it was a bar to the plaintiff's action on the case for a disturbance of his franchise; though it was clear that the user originated without any rightful authority. [*Le Blanc* J.]. The ground on which that case went off was merely this, that the Court having intimated their opinion that if the case went down to trial again upon the same facts, it would be left to the jury to find for the defendant upon the ground of presumption of a grant after 20 years uninterrupted user of the market; the plaintiff's counsel said that if it were to be left to the jury in that manner, with the recommendation of the Court in favour of such a presumption, it would answer no

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(a) 1 Bos. & Pull. 400.

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purpose to go to trial again.] That was certainly the ground on which the case went off; but it shews the strong leaning of the Courts in favour of uninterrupted enjoyment for 20 years. And it is a beneficial presumption for the public, and ought not to be frittered away by giving weight to little circumstances, tending to shew that the enjoyment originated in mistake. And they observed that by nonuser of the way set out by the award for the defendant for the same period, he had now lost his right to it, as a release would be presumed against him.

Park and *Holroyd*, in support of the rule, contended that the Judge's direction was wrong, because an uninterrupted and adverse enjoyment of a way for 20 years was only evidence of a rightful commencement by grant, which was destroyed if it could be shewn to have originated in mistake: neither would a disuser by the defendant of his proper way, arising from a mistake, found the presumption of a release against him. None of the cases, except that of *Holcroft v. Heel*, which has been explained by the learned Judge who was counsel in the cause, go further than to shew that a possession of an easement for 20 years uninterrupted and not explained is evidence for the jury to presume a grant, as in *Lewis v. Price* (a), *Dougal v. Wilson* (b), *Darwin v. Upton* (c), and *Griffiths v. Matthews* (d). But it is admitted in all of them that evidence which goes to explain the possession, and to shew that it originated by mistake, or licence, or in any other manner than on a claim of right, will rebut the presumption. Now here the inclosure act, which passed about 24 years ago, before this action was brought (e), extinguished all former rights and easements, and directs that the award which was to be made under it, allotting the new inclosures and rights of way, should take effect from the enrolment, which was in January 1779. By the award it appears that another way than that now claimed was set out for the defendant's close over the adjoining close, and equally convenient to the occupier; the nonuser of the one and the user of the other was therefore clearly

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(a) *Worcester* Spring Assizes, 1761, cor. *Wilms* J. cited in *Sprig. Williams's* note to *Tard v. Ford*, 2 *Saund.* 175. a.

(b) *Sittings C. B. Trin.* 9 *Geo.* 3. *ib.* (c) *Id.* 175. b.

(d) 5 *Term Rep.* 296.

(e) This was said to be in *Michaelmas* term 1801.

referable to mistake, and so it was understood at the trial, and the doctrine of adverse possession for 20 years giving a right was stated even on that supposition; but such a supposition negatives that it originated from a grant, which alone would support the defendant's claim.

LORD ELLENBOROUGH C. J. We must govern our opinion by the evidence which was given in the cause, and on the learned Judge's direction with reference to the evidence. Now though by possibility the parties might in fact have acted on a mistake of the award, yet on the evidence given, nothing appears to shew that they referred their acts to the award; and therefore it comes to the common case of adverse enjoyment of a way for upwards of 20 years, without any thing to qualify that adverse enjoyment. On looking into the award we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to shew that the parties acted upon such a mistake. There was, therefore, no reason why the jury should not make the presumption, as in other cases, that the defendant acted by right; and that was in substance the direction of the learned Judge. It might indeed be too much to say, in the case of *Holcroft v. Heel*, that the adverse user of the neighbouring market for 20 years was a bar to the action by the grantee of the crown. In strictness it was not; because even after that period the Attorney-General might have filed an information against the party for usurping the franchise. But certainly the evidence in this case was sufficient to warrant the jury in presuming a grant of the right of way.

GROSE J. The motion for a new trial was grounded on the supposed misdirection of the learned Judge. But it appears that in substance he left the question to the jury upon the evidence, Whether the enjoyment originated under a grant or in any other manner? and therefore I cannot say that upon this evidence the jury might not make the presumption which they have done; though, had I been one of them, I do not know that I should have dared to do so. They have, however, found the fact of the grant. As to the question of law, I agree with the case of *Holcroft v. Heel*, as it has been explained by my brother *Le Blanc*, but no farther,

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LAWRENCE J. No doubt but that adverse enjoyment of a right of way for 20 years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment: and such in effect was the opinion of the learned Judge in his direction to them. But it has been said that if the enjoyment were shewn to have originated in mistake, however adverse it may have been, that is against the presumption, and that the learned Judge misled the jury in this respect: but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time. The weak part of the plaintiff's case is, that it does not appear by the evidence that the enjoyment of the way did arise from mistake. Then if there were an adverse possession for above 20 years, and not explained by any evidence, why might not the jury presume a grant? The parties interested might have found the way in question more convenient than that allotted under the award. On the whole of the evidence it appears that for above 20 years the defendant has been using a road which he could have had no right to use but by grant: and the case having been properly left to the jury on that evidence, I cannot say that they have done wrong in finding with the enjoyment for so long a period.

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LE BLANC J. Unless the jury could, in the words of the report, refer the enjoyment for so long a time to *leave, favour, or otherwise than under a claim or assertion of right*, and indeed unless it could be referred to something else than *adverse possession*, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant. In the case of *Halcroft v. Heel* the Court of Common Pleas thought the adverse possession for above 20 years so strong evidence that the Chief Justice ought to have left it to the jury to find a grant of the market from the crown. Therefore, if the possession be adverse, the jury are to take it as a strong ground whereon

whereon to found the presumption of a grant. In this case it is only from suspicion that we are called on to refer it to the award, and to suppose that the parties themselves by mistake considered it to originate from thence: but no evidence was given to shew that they referred the use of the way to the award; and therefore there was no reason why the jury should not have presumed as they have done.

Rule discharged.

BUXTON and Another against BEDALL and Another.

Saturday,
Feb. 5th.

THIS was an action of assumpsit to recover the price of two machines used in the cotton trade, called mules, which were made and put up by the plaintiffs, who were machine makers, for the defendants, who were manufacturers. At the trial before *Chambre J.* at *Lancaster*, it was proved on the part of the plaintiffs that they had performed the work, which was fixed up in the defendants' house at *Manchester*. That while the machines were making the defendants were frequently at the plaintiffs' shop, and objected to different parts of the work, in consequence of which alterations were made from time to time according to their directions, some of which alterations were rendered necessary for want of a sufficient height in the room where the machines were fixed; and after they were so fixed the defendants paid 20*l.* in part. In the progress of the cause it appeared that the agreement under which the work had been done was in writing, which when called for was produced upon unstamped paper, and was as follows:

" *Joseph and Thos. Bedall order of Buxton and Campbells* four
" mules, 228 spindles each, 3 wheels, 16 inch rollers, and one
" 15 inch, 13 inch spindles, iron top roller, a sufficient number
" of change pinions, twist wheels from 30 to 42 teeth advancing
" two each time, a set of clearers for each wheel leaded and
" covered. The wheels are to be complete and good 5*9* per
" spindle; payment half ready money, and the remainder in
" three months; a dozen of change rollers for each wheel to
" be

An executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception in the stamp acts in favour of agreements, &c. for or relating to the sale of goods.

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CAMPBELL
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 —
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" be given in. Two to be made in six weeks, and the remain-
 " ing two in eight weeks from this time.

" Joseph and Thos. Bedall.

" *Manchester*, 11th Nov. 1801."

It was objected, that taking this agreement to be an original (a), it ought to have been stamped; and *Chambre J.* being of that opinion nonsuited the plaintiff. A rule nisi for setting aside the nonsuit having been obtained on a former day, on the ground that this being an order for *the sale of goods* was excepted out of the acts (b) laying a stamp duty on agreements.

Park now shewed cause, and insisted that a stamp was necessary in this case, being no more than an agreement for work and labour and materials to be done and found, and not for the sale of goods, in the common acceptance of the phrase.

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Topping contra, contended that it was an agreement "for or relating to the sale of goods," in the words of the exception in the act; it was like an order by letter for the sending of goods to the buyer, in which case according to common experience it was not necessary that the goods should be made at the time; otherwise the exception which was introduced for the encouragement of trade and manufactures would in most instances be nugatory, as it is well known that in wholesale dealings such orders are in most instances sent before the goods are manufactured. And he referred to *Curry v. Edenfer* (c), where a collateral agreement in writing by a broker to indemnify his principal from any loss on the re-sale of goods was holden to be valid, though unstamped, being a contract relating to the sale of goods.

The court (d), however, were of opinion that this contract did not come within the exception of the act, and therefore ought

(a) A previous question arose, Whether the written agreement produced were an original or only a copy? but ultimately this objection was waved upon the discussion of the case in this court.

(b) Vide 23 Geo. 3. c. 58. s. 4. and subsequent acts of the like kind.

(c) 3 Term Rep. 524.

(d) Lord Ellenborough and *Le Blanc J.* were absent this day on the special commission in *Surrey*.

to be stamped, being a contract not for or relating to the *sale*, but to the *making* of goods, and for work and labour to be done. It was a contract in fieri; as in the case of *Towers v Osborne* (a) where the defendant having bespoke a chariot which he refused to take when it was made, it was objected to an action brought to recover the value of it that the case was within the statute of frauds, nothing being given for earnest nor any note in writing; but the Lord Chief Justice ruled it not to be within the statute, which related only to contracts for the actual sale of goods, which that was considered not to be, but a mere executory contract for work to be done. That in the case of *Curry v Eden* for the agreement related to the *sale* of goods then made.

Rule discharged.

(a) 1 *Str.* 506.

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against
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BYRNE and Another against AGUILAR.

Saturday,
Feb. 5th.

THE defendant, who was bail in the original action, obtained a rule to shew cause why the proceedings against him should not be stayed for irregularity, with costs.

On the 17th of *February*, after verdict obtained by the plaintiffs in the original action, on which judgment was entered in *Easter* term, they sued out a writ against the defendant on his recognizance of bail returnable the first return of last *Easter* term. On the 13th of *May*, *Manley*, the principal, surrendered himself in discharge of his bail, (being the eighth day after the return of the writ); and on the *same* day a notice of such render was served on the plaintiff's attorney, and a committitur entered in the marshal's book; and on the 15th of *May* an affidavit of such service was lodged with the clerk of the rules, and the marshal's certificate of render delivered to the filacer to enter an exoneration on the bail-piece. Notwithstanding which the

Where after due notice of render of the principal the plaintiff still proceeds against the bail in the action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them nor any rule obtained by them to stay proceed-

ings in the action against them on payment of costs; held the subsequent proceedings irregular, being contrary to the rule of Court, *Trin. 1 Ann.*, which says that on such notice of render all further proceedings against the bail shall cease.

present

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present defendant, one of the bail, was served with a declaration on the 26th of *June*, and notice to plead given within the four first days of last *Michaelmas* term. Upon which notice was given that the Court would be moved, which was accordingly done last term, when this rule was granted. *Manly*, the principal, was not charged in execution in *Trinity* term last, because the attorney for the plaintiffs conceived (as he stated in his affidavit) that it would have prevented the plaintiffs from proceeding in this action (a): but it was their intention to have charged *Manly* in execution if the defendant after the render had applied to the Court or a Judge to stay proceedings in this cause against the bail on payment of costs in the action against the bail; which was sworn to be the general practice in such cases. And the question was, Whether the plaintiffs were entitled to proceed in this action for want of such application on the part of the bail?

Littledale shewed cause against the rule, and relied on the practice as above stated, and said, that by the defendant's not having applied to stay proceedings till *Michaelmas* term last, which he could only have entitled himself to on payment of costs, the plaintiffs had lost the opportunity of charging the principal in execution in *Trinity* term. And he cited *Perigal v. Mellish* (b), *Meadowcroft v. Sutton* (c), *Filber v. Branscombe* (d), and *Abbott v. Rawley* (e), in which latter case the objection was expressly taken to making the rule absolute for staying proceedings against the bail, unless upon the terms of paying the costs of the action against them as well as of the action against the principal; which was accordingly ordered. He also observed, that before the rule of Court in *Trin. 1 Anne* (f) (whereby it was ordered that if bail were impleaded in debt upon the recognizance they should have eight days to render the defendant, and that on notice thereof all further proceedings should cease) the plaintiff was entitled to his costs in the suit against the bail, though it was otherwise as to the costs of a *scire facias* before

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(a) Vide *Ewer's case*, Qto. *Barnes*, 66. (b) 5 *Term Rep.* 363.

(c) 1 *Bos. & Pull.* 61.

(d) 7 *Term Rep.* 355.

(e) 3 *Bos. & Pull.* 13.

(f) Vide *Inq. Clr. B.R.* 396.

the stat. 8 & 9 W. 3. ; and that rule which was made to give an indulgence to the bail could not take away the costs which were given by statute: the defendant therefore could only avail himself of the indulgence given by the rule of Court, on the condition of paying the costs which had legally accrued.

Wigley, contrà, said that was this an attempt to fix the bail with the whole debt, because the costs of the action on the recognizance were not paid, not having been demanded; and although they had complied with the rule and practice of the Court in having rendered the principal in due time and given the proper notice, in which case the rule of *Trin. 1 Ann.* expressly declares that "all further proceedings against the bail *shall cease*." Even before the rule of *Trin. 1 Ann.* the Court in one case (a), where proceedings were stayed on the application of the bail in debt on the recognizance, only allowed costs, because there had been pleadings in the cause before such application: but since the rule, all subsequent proceedings, after a render in due time and notice, are made irregular and void without the necessity of applying to stay them. If then the plaintiffs be entitled to costs up to the time when the render was made and notice given, they must be obtained by some other mode of redress or application to the Court, and not by proceeding in the action against the bail. In *Abbott v. Lawley* (b) the application was to stay proceedings on payment of the debt as well as the costs; but here the render was in time to discharge the bail from their liability to the debt.

Lord ELLENBOROUGH C. J. If a plaintiff proceed after due notice of the render, he does it at his peril, the rule of Court having declared that on such conditions all further proceedings shall cease.

Per Curiam,

Rule absolute without costs.

(a) *Anon. Hil. 11 W. 3. 1 Salt. 101.* (b) *3 Bos. & Pull. 13.*

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1803.

Saturday,
Feb. 5th.

INLAY against ELLEFSEN.

One who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause of action in substance; the first affidavit to hold to bail being adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by the defendant for the plaintiff, and the money received to his use.

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A RULE was obtained in the last term calling on the plaintiff to shew cause why the defendant should be not discharged out of custody on filing common bail. This was grounded upon an affidavit of the defendant and two other persons, stating that the defendant on the 17th of May last was arrested in London at the suit of the plaintiff for 3000*l.* upon a writ returnable the fourth return of *Easter* term, and was holden to bail upon a certain affidavit to hold to bail, (referred to and set out in the present affidavit, which together with the proceeding thereon in this court will be found in the report of the case, *ante*, 2 vol. 453.); whereupon he obtained a rule nisi for his discharge on filing common bail, which rule was discharged in *Trinity* term last. That afterwards the plaintiff having neglected to declare against the defendant within two terms, the latter obtained his discharge on the 10th of July last on filing common bail; and two days afterwards was arrested again at the suit of the plaintiff for 2000*l.* upon another affidavit, dated the 10th of July, made by Robert Cowie, the same person as before, who therein as one of the trustees of the estate of Inlay the plaintiff under an assignment for the benefit of creditors swore, that the defendant was justly indebted to the plaintiff in 2000*l.* and upwards for money had and received by him to the use of the plaintiff; by virtue of which the defendant is now in custody. The affidavit then proceeded to state in express terms that the arrest under the second writ was for the same cause of action as the former, and was founded upon a supposition that the defendant had received the money for the silver bars sworn in the former affidavit to hold to bail to have been delivered to him by the plaintiff for the purpose of being conveyed to one E. B. at *Gottenburgh* in Sweden. The defendant then proceeded to negative in direct terms that any silver whatever had been put on board his ship to his knowledge or belief; and that if any had been so put on board it must have been clandestinely between the plaintiff and the mate of the ship, without the defendant's privity. And he also denied having ever signed or delivered any acknowledgment for any silver to the plaintiff or any other person. And further,

he denied having ever disposed of any such silver, or received the produce of the same or any part thereof, together with various other matter connected with the merits of the case. In answer to this affidavits were read of the plaintiff and *R. Cowie*, expressly contradicting the affidavit of the defendant upon the merits, and swearing expressly to his having received the silver bars in the manner described in the former report, and to his having signed a receipt for the same, which receipt was inclosed in a letter to be sent to *E. B. of Gottenburgh*, and incautiously committed to the defendant's care to be by him delivered, which he had not done. But not denying that the present action was brought for the value of the same silver. And concluding, that if the defendant were permitted to go at large he would withdraw himself out of the jurisdiction of the Court, and the plaintiff would lose his debt.

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IMLAY
against
ELLERMAN.

Garrow and *Walton* shewed cause, contending that the second arrest and holding to bail was good, the first action having been discontinued; and cited *Whalley v. Martin* (u), *Keeling v. Elliott* (b), *Turton v. Hayes* (c), *Bates v. Barry* (d), and *De La Cour v. Read* (e), which latter was a stronger case than the present; for there the defendant was holden to bail in an action on a judgment, after having been discharged on a common appearance in the original action by the act of the plaintiff in declaring against him in a different form of action from that mentioned in the first writ and the affidavit thereon to hold to bail. And in *Olmus v. Delany* (f), where the bail put in to the first action were perjured and shewn to be worth nothing, the Court permitted the plaintiff to hold the defendant to bail a second time for the same cause of action, even before he had discontinued the first action, which however was done afterwards. A fortiori they insisted that the Court would not relieve the defendant in this case where he himself appeared to be forsworn. They also contended that this was a different cause of action from the first: the one having been brought for the silver itself in specie, the other for money had and received, upon a supposition that he had sold it as the agent of the plaintiff, and received the value. And concluded, that unless the defendant,

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(a) *Qto. Barnes*, 62.(b) *Ib.* 399.(c) 1 *Str.* 439.(d) 2 *Wils.* 381.(e) 2 *H. Blac.* 278.(f) 2 *Str.* 1216.

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against
ELLENSEN.

who was a foreigner, was detained in custody the plaintiff would lose his debt.

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Erskine, contra, said that the conduct of the plaintiff appeared to be vexatious and oppressive in holding the defendant to bail in this second action, for that which plainly appeared to be the same cause of action for which he had been arrested and detained in custody before; and from which custody he had been liberated on account of the wilful laches of the plaintiff himself in not declaring against him in time, in which case all the books of practice (a) agreed that a defendant could not be holden to bail in the second action. That supposing the fact of the defendant's having sold the silver and received the money were true, the plaintiff might as well have recovered in the first action of trover; and no good reason could be assigned why he should have brought this action.

LORD ELLENBOROUGH · C. J. This action appears plainly enough to be founded on the same cause of action as the former, though in a different form, and might by proper averments have been shewn to be the same, if there had been a recovery in the former action. It is likely enough that if the defendant, being a foreigner and not residing in this country, be discharged on filing common bail, the plaintiff will lose his debt, but that ought not to warp our judgment in applying the law to the facts disclosed to us. There are many cases in the books where a plaintiff has been suffered to hold a defendant to bail a second time for the same cause of action, as where he has erroneously commenced his action, or mistaken his remedy, and has discontinued it in due time, without oppression or laches. But here the full time elapsed which the law allows for his detaining the defendant in custody upon the first arrest, and after his discharge he arrested him a second time, and requires the Court to aid the former defect in his proceedings or proof by continuing the defendant in custody for a further period for the same cause of action, which must be sustained by the same proof, and even something more than would have sufficed in the former action. It is harsh enough to deprive men of their liberty as a security for debt in the first instance; but after

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(a) Vide 1 Tidd. 85. and Crompt. PraB.

having continued the defendant in custody until the plaintiff lost the benefit of it by his own default, I should require a very strong case to induce me to consent to a further imprisonment.

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against
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GROSE J. declared himself of the same opinion.

LAWRENCE J. observed upon the case of *Olmus v. Delany*, that the bail procured by the defendant in the first action, being forsworn and proved to be worth nothing, were in effect no bail, and the plaintiff had not the security which by law he was entitled to have; and the defendant was in effect only holden to bail once, which was in the second action. This action must be considered in substance to be brought for the same cause as the former: and to this purpose there is a strong case in *Strange of Taylor v. Wasteneys (a)*, where the defendant after having been arrested for a debt, and detained in custody till he was superseded, afterwards gave the plaintiff a note for part of the debt, on which a new action was brought, and he was holden to bail; but the Court discharged him on common bail, saying it was but a further security and did not extinguish the former cause of action. However ill the defendant may have behaved, we are not to punish him by confining him in prison upon a second arrest for the same cause as before.

LE BLANC J. The rule would be nugatory that a party should not be holden to bail a second time for the same cause of action, if after a first arrest on which the defendant was detained in custody as long as the rules of law would admit, and from whence he was discharged on account of the delay of the plaintiff in not declaring against him in time, the defendant should be again liable to suffer, by being holden to bail again in a second action for the same cause.

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Rule absolute.

(a) 2 *Stra.* 1218.

1803.

Saturday,
Feb. 5th.

PAGE against WIPLE.

No action will lie for *not preventing but permitting and suffering* the plaintiff to be arrested, after payment of debt and costs owing to the defendant, upon a writ sued out before such payment. Malice is the gist of all actions for injuries of that nature.

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IN an action the case, the first count of the declaration stated, that the plaintiff, before the committing of the grievance aforementioned, was indebted to the defendant in 43*l.* 15*s.* 6*d.* by reason of the several promises in the writ next after mentioned; and being so indebted, the defendant, for the recovery of the said sum, on the 25th of *June* 1801, but without the knowledge of the plaintiff, sued out of *B. R.* against the plaintiff a writ of alias capias; that the plaintiff, *after the suing forth of the said writ*, and before he had any notice or knowledge of the suing out of the same, and before the return thereof, and before the arrest of the plaintiff by virtue of the same, viz. on the 8th of *July* 1801, at, &c. *paid to the defendant* the said sum of 43*l.* 15*s.* 6*d.* so due to him as aforesaid; yet that the defendant, contriving and *maliciously intending to injure and prejudice* the plaintiff, and to *put him to great expence, and otherwise to harass and aggrieve* him, afterwards, and after the defendant had been and was so as aforesaid paid and satisfied the said sum of 43*l.* 15*s.* 6*d.* for the recovery whereof he sued and prosecuted the said writ against the plaintiff, to wit, on the 11th of *July* 1801, at, &c. *wrongfully, unjustly, and maliciously*, and notwithstanding such payment and discharge of the said 43*l.* 15*s.* 6*d.* for the recovery whereof, &c. *caused and procured* the plaintiff to be arrested by virtue of the said writ of alias capias, and under colour and pretence of the same, and of the aforesaid cause of action therein specified: and to be kept and detained in custody by virtue of the said writ for two days, and until the plaintiff, with his surety, was obliged to give a bail bond to the sheriff for his appearance at the return of the said writ, &c. and plaintiff was obliged to lay out 4*l.* 4*s.* in obtaining his discharge from such arrest and imprisonment. The second count was in substance the same, only alleging further, that by reason of the payment of the debt to the defendant *he ought to have directed the sheriff*, to whom he had so delivered the said writ for execution, *not to arrest or take the said plaintiff* under and by virtue of the same: yet the defendant, well knowing the premises, but contriving to injure and prejudice the plaintiff, and put him to ex-

pence, and otherwise to harass and aggrieve him, *did not direct* the said sheriff, &c. not to arrest and take the plaintiff, but wholly *neglected* so to do; whereby, &c. The third count varied from the others by stating that after the delivery of the writ to the sheriff, and before the arrest of the plaintiff, &c. he the plaintiff *fully satisfied and discharged the said cause of action* in the said writ specified by *paying to the plaintiff, with his assent*, 43l. 15s. 6d. *in full satisfaction and discharge of the damages* he had sustained by reason of the non-performance of the several promises and undertakings in the said writ mentioned, *as also* 1l. 16s. *for and towards and in satisfaction of the costs and charges* by him sustained in the prosecution of the said writ; by reason whereof *it became and was the duty of the defendant to prevent, and he the defendant ought to have prevented* the plaintiff from being arrested, &c.: yet the defendant, well knowing the premises, but contriving to *injure and prejudice* the plaintiff, and put him to great expence, and otherwise to aggrieve him, *did not in any manner prevent the plaintiff from being arrested, &c.* but *suffered and permitted* him to be arrested, &c.

After verdict for the plaintiff, with 5l. damages on the third count,

Wilson moved in the last term to arrest the judgment on the insufficiency of that count, in not alleging malice in the defendant as in the first count, which was negatived in evidence at the trial: and he cited *Scheibel v. Fairbairn* (a) as in point, that no such action will lie for a mere nonfeasance, but only on malice alleged and proved.

Sellon Serjt. and *Best*, in shewing cause, now endeavoured to distinguish this case from that by observing, that there the writ was sued out before the debt was paid, and the plaintiff did not allege payment of the *costs* as well as the debt, without which there was no obligation on the defendant to countermand the arrest. And *Heath* J. particularly observed, that at all events the party was not bound in that case to stop the action until the costs were tendered. And Lord C. J. *Eyre* said, there was no consideration for any duty to attach upon. But here there is an averment that the debt and costs were paid, upon which it

(a) 1 *Bos. & Pull.* 388. where all the prior cases are collected; to which may be added *Gibson v. Chaters*, 2 *Bos. & Pull.* 129.

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became the duty of the defendant to stop the execution of the writ at his peril.

Lord ELLENBOROUGH C. J. (stopping *Gibbs and Wilson* for the defendant.) Taking the averment that 1*l.* 16*s.* * was paid to the defendant "*for and towards* and in satisfaction of the costs" most favourably for the plaintiff, as meaning that it was taken in *satisfaction* of the costs; still I think the case not distinguishable in principle from that of *Scheibel v. Fairbain*. Is it the duty of a plaintiff to run after his writ, which has properly issued, in order to stop the execution of it? or is it not rather the concern of the debtor, when he satisfies the demand, to ask for a countermand of the writ or an order for his discharge? Nothing *wilful* is alleged to have been done by the defendant, but only that he *suffered and permitted* the plaintiff to be arrested. Nothing is stated to shew that this was done by way of vexation or oppression, but a mere nonfeasance. The question is, Whether under the circumstances stated it *became and was the duty of the defendant to prevent the arrest*? I know of no authority which imposes such an obligation. The defendant might have asked for a countermand: he must look to the consequence, if the writ were properly sued out at the time. We cannot intend that any thing was done vexatiously, when nothing of the sort is alleged.

Per Curiam,

Rule absolute.

Monday,
Feb. 7th.

ARDEN *against* WATKINS.

One who had committed a secret act of bankruptcy procures the defendant to lend him his acceptance, and as a security pledges the lease of his house; and having drawn the bill payable to his own order, indorses it to the plaintiff for a valuable consideration, without notice of his bankruptcy; held that, in an action by the plaintiff as indorsee against the acceptor, the latter could not defend himself on the ground of the drawer's bankruptcy at the time of such indorsement, or on account of the assignees having withdrawn from him the lease deposited as a security for his acceptance.

THE plaintiff declared as indorsee of a bill of exchange against the defendant as acceptor; which bill was stated to bear date the 4th of *December* 1801, and to * be drawn by one

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Lewis Jones, for one hundred pounds, payable six weeks after date to his own order, and to be directed to and accepted by the defendant: and that *Jones* afterwards indorsed it to the plaintiff. There were also the common counts. To all which the general issue was pleaded. And at the trial, at the Sittings at *Westminster*, a verdict was taken by consent for the plaintiff, subject to the award of a gentleman at the bar; who, after hearing the cause, made an award in favour of the plaintiff, that the defendant should pay him the amount of the bill and costs: and in his award also stated the following facts, in order that the opinion of the Court on the question of law might be taken by the defendant, if he thought proper.

Lewis Jones, on the 4th of *December* 1801, drew the bill of exchange in the pleadings mentioned on the defendant, who accepted the same for the accommodation of *Lewis Jones*. On the same day *Lewis Jones*, to whose order the bill was payable, indorsed the same to the plaintiff for the full value thereof paid to him by the plaintiff. *Lewis Jones*, being a trader, committed an act of bankruptcy on the 5th of *October* 1801, and a commission of bankrupt was found against him on the 31st of *December*, whereupon he was declared a bankrupt, and his estate and effects assigned by the commissioners to assignees. The defendant was not indebted to *Lewis Jones* at the time of such acceptance, but he lent his acceptance to *Lewis Jones* to enable him to raise money thereon. The plaintiff, when he advanced the money to *Lewis Jones* on the said bill, had no notice of the said act of bankruptcy, nor did he know that *Lewis Jones* was insolvent, nor had he any knowledge whatever of the said transactions between *Lewis Jones* and the defendant. The assignees of *Lewis Jones* have made no claim whatever on the plaintiff touching the premises: but the defendant has been called on by the said assignees to deliver up to them a lease of a house in *Bernard-street*, which, at the time of the said acceptance, he pledged with the defendant for securing the payment of 150*l.* and interest on the 20th of *January* then next, and *Lewis Jones* undertook on demand to execute an assignment of the said lease by way of mortgage. This lease was so pledged for the purpose of indemnifying the defendant against his said acceptance. The defendant has delivered up the lease accordingly.

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A rule having been obtained calling on the plaintiff to shew cause why the award should not be set aside as against law,

Erskine and *Manley* shewed cause. If *Jones* the trader, being indebted to the plaintiff, had undertaken to the defendant *Watkins* that if he would give the plaintiff his own security for 100*l.* for the debt, he, *Jones*, would repay him; and the defendant, relying on *Jones's* promise, had accordingly given his note; it could not have been contended that the plaintiff would be repelled from recovering on such security, because *Jones*, who induced the defendant to give it, was a bankrupt at the time. Then the circumstance of the bankrupt's name being upon the bill as drawer cannot alter the case; for the assignees, who must stand in the same situation as the bankrupt, can have no claim to the bill. The bankrupt himself had no claim upon the defendant; and having given no consideration for his acceptance, it was nudum pactum as between them, though not so with respect to third persons, to whom the bill with the acceptance was passed for a bona fide consideration. If the assignees had brought an action against the defendant on his acceptance, the want of consideration would have been a decisive answer to the action. If they had brought trover for the bill against the plaintiff, the answer would have been, that even though the bankrupt's indorsement were void and could pass no property to the holder, still they could have no property in the bill. For as between the drawer and acceptor, the former was a mere trustee for the latter so long as the bill remained in his hands, and consequently no property in it could pass by the assignment. The assignees however could not deprive the plaintiff of his security even as against the bankrupt; for though the latter could not bind his property at the time, he is certainly liable in his person. Neither could the bankrupt be said to have ever had any property in his own bill and indorsement: for in his own hands they were worth nothing, and only became property when the bill was passed to the plaintiff. But whatever doubt there might have been between the plaintiff and the assignees, that cannot affect the present question between these parties; for the assignees, as it was competent for them to do, have repudiated the bill, and disclaim the transaction altogether: and if they do not choose to interfere, it is not competent to any other person

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to set up their title. As in *La Roche, Bart. v. Wakeman* (a), where an uncertificated bankrupt having been permitted by his assignees to trade without molestation on his own account, his assignment of a ship of which he was in possession was holden by Lord *Kenyon* to be valid as against all the world but his assignees, and subject only to their disaffirmance. That was a stronger case than the present, because it affected existing property; whereas here the bill was mere waste paper as between the bankrupt or his assignees and the defendant. If it be urged by the defendant that in case the drawer had not become bankrupt he would have been indemnified; but that having had his security withdrawn from him by means of the bankruptcy, his situation is altered, and therefore he ought not now to be liable, having lost the consideration for which he gave his acceptance: the answer is, that however true that might be as between him and the bankrupt, yet this being unknown to the plaintiff who has advanced his money on the defendant's credit, which the latter enabled the bankrupt to pledge absolutely, the plaintiff ought not to suffer for the failure of a condition to which he was not privy between the defendant and the bankrupt. Even on the count for money paid, the plaintiff is entitled to say that he has laid out money for the defendant's use; for the bill was drawn by the bankrupt and accepted by the defendant, by virtue of an agreement between them that the defendant would enable the other to raise so much money from any third person by pledging his the defendant's name to him for the repayment.

Gibbs and Lawes contra. Every thing which a bankrupt possesses at the time of his bankruptcy and before his certificate passes to his assignees, except trust property; which this was not; for the acceptance was not given for the benefit of the acceptor, but of the bankrupt, and therefore was valuable property in his hands. The case must be considered the same as if the bankrupt having placed money of his own estate in the hands of the defendant, had after his bankruptcy drawn this bill upon him payable to his own order, which the defendant had accepted, or had ordered him to pay it over to a third person. The money so placed would in truth have been the money of the

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(a) *Peake's Ni. Pri. Cas.* 140.

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assignees, and the defendant would not have been warranted in paying it away to the order of the bankrupt. A bankrupt after his bankruptcy may indeed make himself liable in his own person as drawer, but he cannot charge his estate; and this is an attempt to charge his estate in the hands of the defendant. The objection then in this case lies to the title of the plaintiff, which is derived through the bankrupt's indorsement. The defendant is an acceptor for a valuable consideration, namely, the lease which was deposited with him by the bankrupt as a security for his acceptance. This it now appears was the property of the assignees at the time; and they had an option at least either to have adopted the bankrupt's act and sued upon the bill, or to have withdrawn the deposit out of the defendant's hands. That shews that there was a property in the bill in the bankrupt which passed to his assignees: if so, the bankrupt could not pass it away to a third person by his indorsement, but it vested by law in the assignees without any particular assent of theirs: and property so vesting, if it can be repudiated at all, must at least be so by some express act declaratory of such an intent. The situation of an acceptor in such cases is peculiarly hard, if the assignees may withdraw from him the security which was the consideration of his acceptance, and yet leave him liable on the bill. But admitting that such withdrawing of the deposit amounted to a repudiation of the bill by the assignees, yet that having taken place after the indorsement by the bankrupt, could not by relation back make good the indorsement, so as to transfer the property which was in them at the time: and Lord Kenyon in *Pinkerton v. Adams* (a) seems to have considered that a bankrupt could not transfer the property in a bill by his indorsement made after his bankruptcy; but that it was a defence under the general issue, as the defendant only promised to pay to such as had a legal title to the bill. [Lord Ellenborough. The bankrupt there had a property in the bill before his bankruptcy. — *Lawrence J.* That case only decided that it was evidence on non assumpsit whether the bill were legally indorsed to the party suing.]

Lord ELLENBOROUGH C. J. As doubts are stated to have been entertained on the question, we will look into the cases;

(a) 2 *Esp. Ni. Pri.* 611.

but

but at present I cannot impress on my mind any doubt on the subject.

LAWRENCE J. (being the only Judge in court on this day) delivered the opinion of the whole Court, who heard the case argued on a former day.

This came on upon a motion to set aside an award of Mr. *Burrough's*, who has decided in favour of the plaintiff, the indorsee of a bill of exchange drawn by one *Lewis Jones* on the defendant, and accepted by him. The arbitrator, having stated the facts specially, has enabled the defendant to take the opinion of the Court, whether the arbitrator has decided rightly on the law arising from those facts; which are as follow: *Lewis Jones* being a trader, and having committed an act of bankruptcy, on the 5th of *October* 1801 drew the bill in question on the defendant, who accepted it for his accommodation to enable him to raise money on it; he the acceptor not being then indebted to *Jones*; who at the time of the acceptance pledged the lease of a house in *Bernard-street* with the defendant, undertaking to execute an assignment thereof by way of mortgage, for the purpose of indemnifying the defendant against his acceptance. *Jones*, to whose order the bill was payable, indorsed it the same day it was accepted to the plaintiff, who paid a full value for it, and had no knowledge of the act of bankruptcy, nor of *Jones's* insolvency, nor of the transactions between *Jones* and the defendant. A commission having issued against *Jones* on the 31st of *December*, the assignees under that commission required the defendant to deliver up the lease which the bankrupt had pledged, which he accordingly did. For the defendant it has been contended that the property in this bill passed to his assignees, who take whatever property he may have that is not trust property, which this bill is alleged not to have been. That the deposit of the lease was a consideration for the bill, and that the transaction is the same, as if the bankrupt had placed in the defendant's hands 150*l.* of the money of his assignees, on his undertaking to pay that money to his (*Jones's*) order; and as such order could give no authority to the plaintiff to receive the money of the assignees, he cannot recover. With this reasoning and statement we do not agree. The transaction is strictly this: *Jones*, the bankrupt, having no money in the defendant's hands, procures him for his (*Jones's*) accommodation to

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to accept a bill, and to indemnify him against that acceptance deposits in his hands a lease, which was the property of his assignees by relation of law. As between *Jones* and the defendant, there was no consideration which would enable *Jones* to sue the defendant on the bill: it was never intended that the defendant should be liable to *Jones*; but that *Jones* should raise money on it by negotiating the bill: and the lease was not deposited with the defendant to be by him disposed of as a thing for which he had paid by his acceptance, but merely as an indemnity in case *Jones* should not repay what he might be obliged to pay in consequence of his acceptance. If therefore *Jones* could not sue, had the bill remained with him, his assignees could not. If there were no means of making this bill available in their hands for the satisfaction of the demands on the bankrupt, it would not pass to them; and it is upon this principle, that what a bankrupt holds as a trustee will not pass. To make this like the case put of depositing the assignee's money in the defendant's hands, and then giving the plaintiff an order to receive it, the engagement of the defendant should have been to deliver the lease to the bankrupt's order. The case is no more than this: the defendant, in consideration of a security which the assignees of the bankrupt could make void, accepts the bill in question: the assignees do avoid the security: the consequence is, that it becomes an acceptance without consideration; an acceptance, in which, as the bankrupt could not sue on it, his assignees have no interest; and the defendant cannot resist this demand on the ground that the plaintiff has no title; and the want of consideration furnishes no defence to one who has advanced money on the credit of the acceptor. We therefore think that the arbitrator has judged right, and that the rule must be discharged.

Rule discharged,

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LAKE and Another *against* ASHWELL and Others, Assignees of *Tuesday,*
 WALLIS a Bankrupt. *Feb. 8th.*

IN trespass for breaking and entering the house of the plaintiffs, and taking and converting the goods therein to the defendants' own use, which was tried before *Hotham B.* at the last *Chelmsford* assizes; upon the general issue pleaded, a verdict was found for the plaintiffs for 57*l.* 11*s.* 6*d.* (the value of the goods taken) with liberty to the defendants to move the Court to set aside the verdict and enter a nonsuit, upon the ground of an objection arising on the stamp acts, as after stated.

The house in question, situated at *Colchester*, and the furniture in the same, had been the property of one *Wallis* a trader, who was considerably indebted to the plaintiffs, linen-drapers in the same town, and having been pressed by them for some security, agreed to give them a conveyance of the house, valued at 800*l.* and a bill of sale of the furniture, valued at 57*l.* 11*s.* 6*d.* which were accordingly executed, and bore date on the 23*d* of *May* 1801. After the execution of these securities, which were prepared by a person of the name of *Strutt*, who for some time before had acted as the agent of *Wallis*, a person was put into the house by *Strutt*, and it was afterwards let by him to a tenant, without any mention made of the plaintiffs' names, and the receipt for the rent was given by *Strutt* in the name and for the use of *Wallis*, and *Wallis's* name still continued on the parish rates. And therefore one of the questions intended to have been raised in argument by the defendants was, Whether the conveyance and bill of sale were not fraudulent and void by the statute 21 *Jac.* 1. But upon this part of the case no opinion was given by the Court. The material question arose on the bill of sale of the goods, which was under seal, and when produced at the trial, had an inventory of the goods annexed to it. The bill of sale itself had the proper deed stamp: but the inventory consisting of four sheets of paper had only a five shillings stamp affixed on the first of the four sheets, there being no stamp on the other three. Whereupon it was objected that the inventory, annexed and referred to in the bill of sale, was part of the same deed, and ought to have had a deed stamp, amounting

A schedule of goods referred to in a deed, to which it was annexed, must have the proper deed-stamp by stat. 37 *Geo.* 3. c. 90. s. 7. according to the number of words and sheets, and not merely the single schedule stamp of 2*s.* 6*d.* imposed by the 1*st* section of the act.

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ing altogether to 20s. and not merely a 5s. stamp on the first sheet. The learned Judge however suffered the cause to go on, but reserved the point; and the defendants afterwards established their right to the property in question, (supposing it to remain in *Wallis*) under a commission of bankrupt issued against him, dated in *January* 1802, under which *Ashwell* and two others of the defendants were chosen assignees. A rule having been accordingly obtained in the last term for setting aside the verdict and entering a nonsuit,

Espinasse now shewed cause, and contended that 5s. was the proper stamp for the schedule, viz. 2s. 6d. by the stat. 37 Geo. 3. c. 90. s. 1. and as much more by a former act. The words of the respective acts are, for "any inventory or catalogue of any furniture, goods, or effects, made with reference to any agreement, or for the security of any person, not hereby otherwise charged, the sum of two shillings and sixpence." That the schedule was one entire thing; though transcribed on several sheets of paper, it still formed but one schedule, for which the stamp was imposed. It was no objection that being referred to in and annexed to the deed, it must be taken to be part of it, and should have had the deed stamp on each sheet; for it was referred to as a distinct instrument, under the appropriate name of a schedule, and the clause in question seems worded so as to meet the objection. But if it were taken to be part of the deed, then it seems by the exception in the clause, "*not hereby otherwise charged*," as if no additional stamp were necessary; for here a stamp duty was otherwise charged, namely, on the deed, which had the proper deed stamp.

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Marryat contra was stopped by the Court.

Lord ELLENBOROUGH C. J. The meaning of the clause in the act of parliament was, that if any schedule or inventory of goods were unattached to or making part of any thing else which required a different stamp, it should have the stamp of 2s. 6d. thereby imposed: but that if the schedule were annexed to and formed part of any other instrument which required a specific stamp, it must have the proper stamp required for that instrument of which it is a part. And if this were not so, the revenue would be liable to great evasion; for then an instrument, requiring a certain stamp in proportion to the number of words, would only contain

contain a few words of reference to a schedule, by which every thing would be conveyed for a trifling stamp in fraud of the revenue. The 7th section of the act referred to expressly provides against this practice; for it says, "that the number of stamps required to be put on every sheet of paper, &c. on which any indenture, &c. or other deed hereby charged with the duty of 3s. &c. shall be written, shall be calculated according to the number of common law sheets, each containing 72 words, of which such indenture, &c. or other deed or agreement, together with every schedule or instrument annexed unto, &c. the same, shall consist in manner following," &c. It then proceeds to apportion the stamp according to the number of words and sheets of which any deed, &c. together with such schedule shall consist. This fully explains the meaning of the other clause.

LAWRENCE and LE BLANC Justices (a) assented.

On the ground therefore that the stamp used was improper, the Court made the

Rule absolute to enter a Nonsuit.

(a) *Grose J.* was absent from indisposition.

HOLMES against WAINWRIGHT, One, &c.

Tuesday,
Feb. 8th.

ERSKINE obtained a rule for changing the venue from London to *Yorkshire* in an action for maliciously suing out a commission of bankrupt against the plaintiff, upon an affidavit that all the witnesses lived in *Yorkshire*, and that great expence and inconvenience would be incurred in bringing them up.

Gibbs shewed for cause, that the affidavit on which the commission was sued out was made in *London*, which entitled the plaintiff to lay the venue there. And by the rules of the Court the defendant cannot change the venue, except upon an affidavit that the cause of action arose altogether in the other county to which it is prayed to refer the trial.

there, where all the witnesses reside, at a great distance from the county where the venue is laid, the Court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact which in point of form exists in the original county.

Where the cause of action substantially arises in another county in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had

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Erskine agreed to admit that fact on the part of the defendant.

Lord ELLENBOROUGH C. J. If the inconvenience of trying the cause in the one or the other county were balanced in any degree, we should not interfere with the acknowledged general right of the plaintiff to try his cause where any part of the cause of action arose; but as the defendant is willing to admit the only fact which exists within the venue now laid, all the convenience and justice of the case preponderates in favour of the application. If the place where the witnesses live were nearer, so as not to weigh so much in point of convenience against trying the cause in *London*, it might be a reason for our not interfering; but here all the witnesses live at a great distance, and the expence of bringing them up must be very great, and there is no convenience balancing on the other side. The Courts were formerly very strict in treating applications of this sort; but of late years the Court of Common Pleas and this Court also have listened to them with more indulgence, where they have seen that the real convenience and justice of the case required it. And here the only objection which can entitle the plaintiff to be heard against it is done away by the admission proposed to be made: and it would be inconvenient not to let the defendant try the cause in the place where substantially the cause of action arises.

Per Curiam,

Rule absolute.

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BROWN against JOHN BENSON.

The husband having taken a bond conditioned to pay his wife an annuity by the obligor, the latter cannot without the assent of the husband agree with the wife to discharge himself from future payments of the annuity for a certain period, in consideration of his discharging certain debts of the husband; but the husband may notwithstanding sue for the arrears of the annuity when due.

of

of that term, then to the plaintiff and his assigns, if he should so long live: and then pleaded, 1. *Non est factum*; on which issue was joined. 2. Payment to *Rebecca* at the several times when the annuity became due. 3. The like payments after the days. Replications to the pleas of payment that on the 24th of June 1801, 5*l.* for ten years was in arrear and owing; on which issues were joined.

At the trial before *Le Blanc J* at *Worcester*, the only question was upon the payment of the first five years, the annuity having been regularly paid to the plaintiff's wife afterwards. As to which it appeared, that the plaintiff, being in embarrassed circumstances at the time when this bond was given, had assigned certain property of his to the *Bensons*, on condition of their giving this bond and paying 20*o**l.* to settle his affairs with his creditors. That soon after the execution of it he left the country, and the *Bensons* having been obliged to pay certain extra demands to redeem some goods of the plaintiff's and in discharge of a further debt of his, in all to the amount of 25*l.* 5*s.*, the plaintiff's wife agreed in his absence to give up five years of the annuity, and to consider the same as paid in satisfaction of those extra demands; and she accordingly signed a receipt as for payment of the first five years in advance. The jury, under the Judge's direction, found as matter of fact that the money was paid *for a debt of the plaintiff's and for his benefit*; reserving the question of law, Whether this could be considered as payment so as to maintain the issues. Accordingly a verdict was taken for the plaintiff for the amount of the five years annuity withheld, with liberty to the defendant to move to set it aside and enter a nonsuit. A rule nisi having been obtained for this purpose in last *Michaelmas* term,

Williams Serjt. and *Abbott* were now called upon by the Court to support the rule. The condition of the bond being that the obligors shall pay to the wife of the obligee a certain annuity, is tantamount to an agreement by the husband that such annuity shall be paid to her for her own separate benefit, and consequently empowered her to dispose of the annual payments as she thought proper. This differs, therefore, from the case of such a bond given to the wife at the instance of a stranger, to which the husband is no party. Under these circumstances payment to the

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wife is payment to the husband. If goods be sold to a feme covert, and it be proved that they came to the husband's use, he would be bound to pay for them. It would amount to an implied authority from him to her to purchase the goods. Now here the payment being made for his use, the same authority must be implied. The wife treated this not only as payment at the time, but afterwards; for she received the subsequent payments as due only when they were paid. But payment before the day is allowed to be good evidence to support a plea of solvit ad diem. *Sturdy v. Arnaud* (a), and *Winch v. Pardon* (b). (Lord Ellenborough said that the law of those cases would not be disputed.) Then it was determined in *Whyte v. Cuyler* (c), that a feme covert having, without authority from her husband, contracted with a servant by deed; yet the service having been performed, the servant might maintain assumpsit against the husband.

Gibbs and *Wigley*, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. However the wife might have disposed of the money after she had received it, yet the bond operated no further than to give her an authority to receive the payments as they became due, and she could not transfer that authority to any body else, or anticipate the payments. The cases alluded and referred to proceed on the ground of goods being furnished or the work done for the benefit of the husband, and his subsequent acts implying a recognition of the authority of his wife sufficient to found an assumpsit against him. But that will not affect this question as to the general authority of a wife to bind her husband in a case where no particular authority can be implied. For this purpose she is no more than a servant, unless acting with a special authority; and it might as well be contended that if a man sent his servant to receive his money of a banker, the servant might release the debt.

LE BLANC J. It might as well be contended that the wife has authority to pay her husband's debts with her husband's money.

Per Curiam (d),

Rule discharged.

(a) 3 Term Rep. 599.

(b) M. 1 Geo. 1. Bull. Ni. Pri. 174.

(c) 6 Term Rep. 178.

(d) *Große* J. was absent from indisposition.

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Tuesday,
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MASON qui tam against MIDDLETON.

THIS was an action of debt upon the statute 1 Jac. 1. c. 22. §. 40. to recover the penalty of 5*l*. alleged to be forfeited by the defendant, by his not suffering, on the 14th of October 1801, *W. W.*, *G. W.*, and *J. R.*, (then being three of the searchers appointed and sworn by the mayor of *Kingslon-upon-Hull* searchers within the same town to search and view within the precincts of their said offices, &c. the leather shoes and other wares made of leather, for one year then not expired), to seize and carry away divers pairs of shoes wrought and made of leather, and insufficiently wrought, then being in the defendant's shop in the said town; in which shop the defendant carried on the trade and business of a *seller* of such shoes; but obstructing, preventing, and hindering them from seizing and carrying the same away, in order that the same might be tried by such triers and in such manner and form as is by the above statute appointed, contrary to the form of the statute, &c. To which the defendant pleaded *nil debet*.

The cause was tried at the last *York* assizes before Lord *Ellenborough* C. J. when a verdict was given for the plaintiff, subject to the opinion of this Court on the following case:

On the 19th of *June* 1801, the mayor of *Kingslon-upon-Hull* did appoint and swear, amongst other persons, *W. W.*, *G. W.*, and *J. R.*, of the said town, searchers within the said town and the precincts and liberties thereof, for the year then ensuing, to search and view within the precincts of their said offices, &c. the leather shoes and other wares made of leather, as often as they should think good or need should be. That the defendant, on the 14th of *October* 1801, carried on in partnership with others the trade of a linen-draper and haberdasher in the said town in an open shop there, in which, with other articles of trade, were exposed for the purpose of public sale certain leather shoes, not made or wrought up by them, but which the defendant had purchased ready made of the manufacturer of them, in order to vend the same in the course of his trade and dealing. And that on the same day the three searchers so ap-

The stat. 1 Jac. 1. c. 22. §. 40. which gives a penalty of 5*l*. against any person resisting the searchers appointed by that act in searching for and seizing goods made of leather ill tanned or wrought, does not attach upon a tradesman who purchases such goods ready made, though with intent to sell again but only upon the original makers of such ill-wrought goods.

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pointed as aforesaid entered into the defendant's said shop to view and search the leather shoes, then being in the same. That the searchers upon their said search did view divers pairs of the said shoes wrought and made of leather, and being insufficiently wrought as aforesaid, which the defendant had bought for resale as aforesaid, and then being in the shop for sale as aforesaid, and were about to seize and carry away the same, in order that the same might be tried by such triers, and in such manner and form as is by the above statute appointed; but the defendant would not suffer them to seize and carry away the same, but hindered them from so doing. The question was, Whether the plaintiff were entitled to recover the above penalty: if he were, then the present verdict was to stand; if not, then a verdict was to be entered for the defendant.

By stat. 1 Jac. I. c. 22. f. 29. certain officers there named shall, four times a-year at least, or oftener if necessary, "make true search and view of and for all shoes, &c. and other wares made of tanned leather in every house, &c. where any shoemaker, saddler, girdler, currier, or other artificer using, cutting, working, or dressing of leather doth dwell or occupy any of the occupations of cutting, working, or dressing of leather, &c.; and it shall be lawful for the said (officers) to seize and carry away all such shoes, &c. which they shall find in their search to be insufficiently made, curried, or wrought."

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By f. 32. all mayors and other head officers in boroughs, &c. shall yearly appoint two or more persons to search, and view within their liberties, who shall make *like search* within their limits. "And if the said searchers find any leather *fold or offered to be fold*, or brought to be searched or sealed, which shall be tanned, wrought, converted, or used, contrary to the true intent of this statute, or any leather insufficiently curried, or any shoes, &c. or any other thing made of tanned or curried leather *insufficiently tanned, curried, or wrought*, contrary to any provision in this act, it shall be lawful to the said searchers to seize all such leather, shoes," &c.

Then f. 40. gives the penalty of 5*l.* against "any person wilfully withstanding or denying any *such search to be made according to the tenor of this act as is aforesaid*; or who will
 "not

"not suffer the said (officers) or other searchers so appointed
 "to enter his house, &c. to view and search all manner of
 "tanned leather, and all manner of shoes, &c. and all manner
 "of wares wrought and made or to be wrought and made of
 "leather, and seize and carry away all such leather, shoes, &c.
 "as they shall find insufficiently wrought, &c. or made of ill
 "stuff," &c.

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Holroyd for the plaintiff commented upon the wording of the above clauses, in order to shew that the penalty was not confined to the *makers* only of wares made with leather insufficiently wrought, who resisted the search required by the statute, but extended to any *vender* of such ill-wrought goods.

The Court however were clearly of a contrary opinion; and that the statute must be confined to the original makers of such commodities. And

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Lord ELLENBOROUGH C. J. observed, that there were no words in the statute to distinguish between the *sellors* and *consumers* of such ill-wrought wares of leather. And that if the defendant, who was a mere purchaser of the shoes ready made, were liable to have his house searched and the goods seized and carried away, the same liability would be incurred by every person who was a purchaser of them for his own use; which was quite beside the object of the Legislature in framing the act.

Per Curiam,

Postea to the Defendant,

Littledale was to have argued for the defendant.

18c3.

Tuesday,
Feb. 5th.

CRUSO and Another against CRISP.

Where the agent of the owner at an auction for the sale of an estate put it up in so many lots at certain prices, and no person bidding for the same, he put it up again in fewer lots at other certain prices, and still no person bidding, he put it up altogether in one lot, at a certain price; and on no person's bidding, the estate was withdrawn from sale; held that this is not a bidding of the owner by an agent, so as to subject the party to the auction duty for want of a notice in writing to the auctioneer (previous to the auction,

of such agency, as required by stats. 19 Geo. 3. c. 56. and 28 Geo. 3. c. 37. in order to excuse the owner from the payment of the auction duty.

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IN an action on the case, and for money paid by the plaintiffs to the use of the defendant, tried at the last assizes for the county of *Norfolk*, the plaintiffs recovered a verdict for 45*l.* on the count for money paid, subject to the opinion of this Court on the following case:

One Mr. *Maitland* was employed by the defendant to sell an estate for him, and the plaintiffs being auctioneers were employed to sell the same by auction. On the 18th of *August* last the auctioneer and other persons being assembled at the *Crown* inn, at *Lynn*, for the purpose of the sale of the said estate by auction, *Maitland* publicly on the behalf; and as the known agent of the defendant, directed the auctioneer to put up the estate to auction in five lots, at certain sums then mentioned by him for each lot. No person having bid for any of the said lots, *Maitland* then publicly on the behalf, and as the known agent of the defendant, ordered the estate to be put up in two lots, at certain sums then mentioned by him for each lot. And no person having bid for either of the said lots, the estate was then put up by order of *Maitland* publicly, on the behalf and as the known agent of the defendant, in one lot, at a certain sum then mentioned by him: but no person bid for the same. The auctioneers returned no sale; but the Board of Excise called upon them for the duty as upon a bidding of the owner by her agent *Maitland*, without notice given in writing. The auctioneers thereupon paid the duty amounting to 45*l.*, and brought this action to recover the same from the defendant. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover.

The stat. 19 Geo. 3. c. 56. s. 5. reciting "that a duty of 3*d.* is to be paid for every 20*s.* of the purchase-money arising by sale at auction of any interest, &c. in any lands, &c., and 6*d.* for every 20*s.* out of the purchase-money arising by sale at

" auction

" auction of all fixtures, furniture, &c. : and that it may be
 " doubted whether the said respective duties are payable for
 " any part of such purchase-money not amounting to 20s. : to
 " obviate such doubts enacts and declares, that the said respec-
 " tive duties so imposed as aforesaid were intended to be charged
 " for every 20s. of the said purchase-money, and so in propor-
 " tion," &c.

By s. 6. " the said respective duties are declared to be a
 " charge upon every auctioneer or feller by commission imme-
 " diately from and after the knocking down of the hammer or
 " other closing of the bidding, at every sale by way of auction ;
 " and that the duties so charged shall be paid by every such auc-
 " tioneer or feller by commission in manner and at the times
 " hereinafter mentioned."

By s. 7. every auctioneer on receiving his licence shall give
 bond to his majesty in 200*l.* with sureties, " that he will
 " within 28 days after each and every sale by way of auction
 " deliver at the Excise-office in *London* an exact and particular
 " account in writing of the total amount of the money bid at
 " each sale, &c. and at the same time make payment of all
 " such sums of money as shall be due to his majesty in pursu-
 " ance of and according to the true intent and meaning of this
 " act, which sums he is thereby authorised to retain out of the
 " produce arising by such sale, or deposit made at such sale, or
 " otherwise recover the same by action of debt or on the case
 " against such person by whom such auctioneer shall be em-
 " ployed," &c.

" Provided (by s. 12.) that in case the real owner of any
 " estate, &c. *put up to sale by way of auction* shall become the
 " purchaser by means of his own bidding or the bidding of any
 " other on his behalf, &c. at such sale, without fraud or collu-
 " sion, then and in such case the commissioners of excise, &c.
 " are authorised and required to make an allowance to such
 " owner of the duties arising by this act upon such bidding :
 " provided notice be given to the auctioneer before such bid-
 " ding, both by the owner and the person intended to be the
 " bidder, of the latter being appointed by the former, &c. to
 " bid, &c. ; and in case of any unfair practice, then no such
 " allowance shall be made," &c. By stat. 28 *Geo. 3. c. 37.*

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s. 20. this notice to the auctioneer is required to be given in writing.

Macintosh for the plaintiff contended that the words "*sale by way of auction*" comprehended not only the actual sale or transfer of property, but extended to every attempt to learn the marketable value of property *put up to sale by way of auction*. The introduction of the 12th section repels any argument that might have been urged as to the common meaning of the word *sale* as used in the preceding clauses; for it appears from thence to have been the understanding of the Legislature, that without that proviso, introduced as an exception to the generality of the provision imposing the duty, any person buying in his own property at an auction would have been subjected to the duty; and yet such buying in is not strictly and properly speaking a *sale*. Then if the word *sale* be meant to extend beyond its accustomed import, no other interpretation of it can be given than that contended for by the plaintiff. Several cases have occurred in the Court of Exchequer to shew that the duty will attach where no *sale* has in fact been made; as in the instance of what is called a *dumb bidding*, that is, where a price is put by the owner under a candlestick, and it is agreed that no bidding shall avail if not equal to that; which was holden to be a fraud upon the revenue, and therefore the duty payable notwithstanding. The effect here is the same as if the seller had bought in the lot after other biddings, in which case the duty would clearly have been chargeable. He gains by this means the same knowledge of what is the marketable value: because if he put up the estate at a certain price and nobody bid, he knows that it will not fetch that price, and so he may lower his demand till he meet with a purchaser. The statute meant by a *bidding* every sum named at an auction by any other person than the auctioneer; and here there was a sum named by the agent for the seller,

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Hulton contra was stopped by the Court.

LORD ELLENBOROUGH C. J. This was not a bidding by the agent for the owner, but something previous to the commencement of the bidding. In order to make it so, the sum must be named by the party at the auction eo intuitu with a view to the purchase of the estate. Here the sum named was beyond the sum which any person could be found to bid for the estate.

The party cannot be said to have acquired any knowledge of the value, but only that it was not worth the sum which he put upon it.

LAWRENCE J. The instance mentioned of what is called a dumb bidding is in effect an actual bidding of so much for the purpose of superseding smaller biddings at the auction.

LE BLANC J. Admitting that this is a mode of acquiring knowledge respecting the value of the estate, it remains to be shewn that the Legislature meant to tax the acquisition of knowledge in that manner.

Postea to the Defendant.

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Wednesday,
Feb. 9th.

UPON a rule for setting aside the proceedings for irregularity, the irregularity was, that the plaintiff had delivered a declaration by the by on which he was now proceeding before he had declared in chief; but the answer was, that the defendant had waved the irregularity by taking the declaration out of the office.

Espinasse, in support of the rule, cited *Tetherington v. Golding* (a) as decisive of the irregularity; where it was said, that a declaration by the by could not be delivered before a declaration in chief.

Taking out of the office a declaration by the by, which was delivered before any declaration in chief, is a waiver of the irregularity.

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Marryat contra relied on the waiver.

LAWRENCE J. (the only Judge in court) held this to be a waiver of the irregularity.

Rule discharged.

(a) 7 Term. Rep. 80.

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Thursday,
Feb. 10th.

The KING against The Justices of BUCKINGHAMSHIRE.

If upon an appeal lodged against an order of removal the Sessions are of opinion that reasonable notice has not been given by the appellant to the respondent parish, they cannot dismiss the appeal on the ground that notice might have been given in time, but are bound by the direction of the stat. 9 Geo. 1. c. 7. s. 8. to adjourn the appeal to the next sessions.

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A RULE was obtained calling on the defendants to shew cause why a mandamus should not issue to them, commanding them to enter a continuance on the appeal of the churchwarden and overseers of the poor of the parish of *Slapton* in the county of *Buckingham*, against an * order of two justices for the removal of *J. Clarke*, a pauper, from the parish of *Whitchurch* in the said county to *Slapton*, as from the last to the next general quarter sessions, and at such next general quarter sessions to hear and determine the matter of the said appeal.

The affidavit on which the rule was obtained stated, that on the 4th of *January* last the pauper was removed under an order of two justices, dated the 3d, from *Whitchurch* to *Slapton*: that on the 5th there was a consultation between several of the parishioners as to the settlement: that on the 6th they advised with their attorney, who on the same day gave the other parish notice of trying the appeal at the next sessions, which was holden on the 13th. That *Whitchurch* is seven miles from *Leighton*, where the attorney for the appellants resided, and ten miles from *Slapton*, the appellants' parish. That the appeal was entered according to the practice of the court. That the notice required by the Court to be given in case of appeal is eight days (one inclusive, the other exclusive). That the appeal being called on, the counsel for the removants, the parish of *Whitchurch*, called on the appellants to prove the notice, which being done, the notice was objected to, as not having been given within a reasonable time before the sessions, which objection was allowed by the Court. Whereupon the counsel for the appellants insisted that the appeal should be adjourned agreeably to the stat. 9 Geo. 1. c. 7. s. 8., and moved the Court to that effect; but the Court dismissed the appeal.

That statute provides " that no appeal from any order of removal shall be proceeded upon unless reasonable notice be given, &c. (by the appellant parish to the parish removing),
" the

"the reasonableness of which notice shall be determined by the justices at the quarter sessions, * &c. and if it shall appear to them that reasonable time of notice was not given, *then they shall adjourn the appeal to the next quarter sessions*, and then and there finally determine the same."

Dayrell, on behalf of the magistrates, submitted to the judgment of the Court to do what was thought proper; but said that they considered themselves at the time as bound by their own rule to reject the appeal, as the removal was made in time for the regular notice required to have been given, which had not been done.

Best, for the respondent parish, shewed cause against the rule, and contended that the statute meant to leave the question of reasonable notice entirely in the breast of the Court of Quarter Sessions, with whose rule of practice in that respect the parties were bound to comply. That by the act of the 13 and 14 Car. 2. c. 12. s. 2, the appeal against an order of removal is required to be made to the *next* quarter sessions; which was not intended to be repealed by the stat. 9 Geo. 1. c. 7. which in effect was now contended for; for if the Sessions were bound to receive and adjourn an appeal where reasonable notice had not been given, in a case where they are of opinion that the removal was made in time to have given such notice, it will follow that an appellant by delaying to serve his notice of appeal till the last moment will have an option to try his appeal either at the next or the succeeding sessions, which has never been considered to be the meaning of the act. The question of reasonable notice is in its nature dependant upon so many circumstances of distance, time, personal convenience, and accident, that none can so properly determine it as the Sessions, to whom the Legislature have referred the decision.

Peckwell, in support of the rule, was stopped by the Court.

LAWRENCE J. (the only Judge in court.) There can be no doubt upon the construction of the act. Before the stat. 9 Geo. 1. it was supposed that if a parish to which a removal was made appealed to the next sessions after the order of removal was served upon it, the Sessions were bound to hear and determine the appeal, although the removing parish had not had sufficient time to prepare itself: to remedy which that act was passed, which directs

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directs that no appeal from any order of removal shall be proceeded upon unless reasonable notice be given, of which the justices in sessions are to judge. That is, they are to judge whether such reasonable notice have or have not been given as will entitle either party to proceed upon the appeal: but the act goes on expressly to direct that if it shall appear to the justices that reasonable notice was *not* given, then *they shall adjourn* the appeal to the next quarter sessions. Now here the sessions have determined that reasonable notice was not given; notwithstanding which, instead of adjourning the hearing of the appeal as required by the act, they have against the positive direction of it dismissed the appeal. There is no ground for supporting their determination.

Rule absolute.

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OUTRAM *against* MOREWOOD, Clerk, and ELLEN, his Wife.

Friday,
Feb. 11th.

If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of stoppel in another action between the same parties or their privies, in respect of the same fact or title.

THIS was an action of trespass against the defendants, for that they with force and arms broke and entered a certain coal-mine or vein of coals lying within and under a certain close of the plaintiff called the *Cow Close* or *Great Cow Pasture*, in the parish of *Alfreton* in the county of *Derby*, and dug out and took and carried away the coals, &c.

Pleas. 1. Not guilty; on which issue was joined. 2. That *John Zouch* of *Coda* or *Castle* in the county of *Derby*, Esq. (afterwards Sir *John Zouch* Knt.) on the 2d of *November*, 38th of *Elizabeth*, was seised in fee of the manor of *Alfreton* and of divers lands and tenements in the parish of *Alfreton*, and that a fine was levied in the octaves of *St. Martin*, 39th of *Elizabeth*, between *R. Roper* and others, plaintiffs, and the said *J. Zouch* deforçant, of the said manor and lands, to the use of the plaintiffs, *Roper* and others, in fee, and a recovery was suffered of the same in *M. 39 Eliz.* wherein *Nicholas Zouch* and *J. Mitchell* were demandants, and *Roper* and others deforçants, and *John Zouch* an infant, the son of the said *J. Z.* was vouchee; which recovery, as to the coals and iron-stone within or under the said land and tenements in *Alfreton* parish, (except the coals and iron-stone within or under any of the messuages, buildings, orchards,

or

or gardens then standing and being on any of the said lands and tenements), with liberty to get and carry the same away, was declared to be to the use of the said *John Zouch* the father for eighty years, if he so long lived, remainder to the use of *J. Zouch* the son in tail male, remainder to *J. Zouch* the son in fee. That *John Zouch* the father, after having been knighted, died in *June 42 Eliz.* and *J. Zouch* the son being so seised on the 4th of *June 15 Jac. 1.* by indenture of bargain and sale duly inrolled, in consideration of 750*l.* conveyed to *Thomas Johnson, George Turner* and *Edmund Meymoth*, in fee, all the coals, veins, mines, and delphs of coals in or under the said lands, tenements or hereditaments in *Alfreton*, which at any time theretofore were the lands, &c. of the said Sir *John Zouch*, with liberty to dig, &c. and search for, get, and carry away coals within the same lands, &c. (except coals within or under any of the messuages, buildings, orchards, and gardens which were then standing or being upon or in any of the same lands, &c.; and also except all the coals, veins, &c. in *Alfreton Park*, and the grounds called the *New Grounds*). The defendants then averred that *the said coal mine or vein of coals in the declaration mentioned, at the time of the making the said indenture of bargain and sale, was part and parcel of the said coal mines, veins, and delphs of coals by the said indenture so bargained and sold.* That *John Zouch* on the 1st of *July, 15 Jac. 1.* died without issue. [Then the defendants proceed to derive title to the said coals, &c. from the said *Johnson, Turner* and *Meymoth*, through various persons down to one *George Morewood*, to whom the same were conveyed in fee by indentures of lease and release of the 1st and 2d of *May 1789.*] The plea then stated, That *George Morewood* afterwards, on the 13th of *June 1788*, duly made his will, whereby he devised all his coal mines and hereditaments, with the appurtenances, unto his wife, the defendant, *Ellen Morewood*, in fee; and afterwards died seised on the 1st of *Jan. 1791*: after whose death the defendant *Ellen* became seised of the said coals, &c.; and on the 10th of *February 1793* intermarried with the other defendant *H. C. Morowood*, by virtue whereof the said *H. C.* and *Ellen* became seised thereof in right of the said *Ellen*. The defendants then averred, that the said coal mine or vein of coals situated, and being within and under the said part of the said close, in,

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which,

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which, &c. in the said declaration mentioned, at the time of the making of the aforesaid indenture mentioned to have been made by the said *John Zouch* as aforesaid, was not within or under any of the messuages, buildings, orchards, or gardens, which were or was standing or being upon or in any of the lands, tenements, or hereditaments in that indenture mentioned, nor was any part of the coals in the park in *Alfreton* aforesaid called *Alfreton Park*, or the grounds called the *New Grounds*, or in either or any of them. Wherefore the defendants being so seised, entered, &c. and dug out and took and carried away the coals, &c.

The replication to the special plea stated, that the defendants, ought not to be admitted in their plea to aver that the said coal mine or vein of coals in the declaration mentioned at the time of the making the indenture of bargain and sale in the said last plea first mentioned was part and parcel of the said coal mines, veins, and delphs of coals by the said indenture bargained and sold as aforesaid; because heretofore, in *Easter* term 32 *Geo.* 3. the plaintiff impleaded the defendant *Ellen*, then *Ellen Morewood*, widow, in a certain plea of trespass, and therein declared against her, for that the said *Ellen*, on the 5th of *May* 1792, with force and arms broke and entered a certain coal mine or vein of coals of the plaintiff, situate and being within and under a certain part of a certain close of the plaintiff called the *Cow Close* or the *Great Cow Pasture*, in the parish of *Alfreton*, in the said county of *Derby*, and dug out of the said coal mine or vein of coals of the plaintiff large quantities of coals, &c. and took and carried away the same, &c.; and that in *Trinity* term 32 *Geo.* 3. the defendant *Ellen* defended the force, &c.; and as to the breaking and entering, &c. the said coal mine, &c. under the *Cow Close*, &c., pleaded that the plaintiff ought not to maintain his said action against her, because the said *John Zouch* in the defendant's last plea mentioned, afterwards Sir *John Zouch* Knt., on the 2d of *November* 38 *Eliz.* was seised in fee of and in the said manor of *Alfreton*, and divers messuages, lands, and tenements, in the parish of *Alfreton* aforesaid, in the said county, with the appurtenances. And the said *Ellen*, in and by her said plea in the said former suit, after further setting forth (amongst other things) the said indenture of bargain and sale in
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the said last plea of the said defendants in this suit first mentioned, in manner and form as the same indenture is in that plea set forth, averred that the said coal mine or vein of coals in the declaration hereinbefore mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel of the said coal mines, veins and delphs of coals, by the said indenture bargained and sold as aforesaid: and the said *Ellen*, in and by her said plea in the said former suit, claimed to be entitled to the said coal mine or vein of coals, in the said hereinbefore recited declaration mentioned, by the same means and in manner and form as the said defendants have above, in their said last plea in this suit in that behalf, alleged; and that she the said *Ellen* was ready to verify: wherefore she prayed judgment, &c. And the said plaintiff, as to the said plea of the said *Ellen* in the said former suit, said that he ought not to be barred, &c.; because, protesting that the said Sir *John Zouch* was not seised in fee of and in the said close in the said hereinbefore recited declaration mentioned, or of or in the coals, veins, mines, and delphs of coal in or under the same, or any part thereof, as by the said last mentioned plea was above supposed, he the said plaintiff said that the said *Ellen*, at the said several times when, &c. of her own wrong, broke and entered the said coal mine, &c. within and under the said part of the said close of the plaintiff called the *Cow Close* or the *Great Cow Pasture*, in the parish of *Alfreton* aforesaid, in the hereinbefore recited declaration mentioned, and dug out of the said coal mines, &c. large quantities of coals, and took and carried away the same, &c. in manner and form as the plaintiff had above complained against her; *without this*, that the said coal mine or vein of coals in the said first count of the said hereinbefore recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in that plea first mentioned, was part and parcel of the said coal mines, veins, and delphs of coal by the said indenture bargained and sold as aforesaid, in manner as the said *Ellen* had in the said plea above alleged; and this he was ready to verify: wherefore, &c. the plaintiff prayed judgment, &c. And the said *Ellen*, as before, said that the said coal mine or vein of coal in the said first count of the said hereinbefore recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in her said plea first mentioned, was part and parcel

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parcel of the said coal mines, veins, and delphs of coal, by the said indenture bargained and sold as aforesaid in manner and form as the said Ellen had in the said plea alleged; and of that she put herself upon the country, and the said Joseph did so likewise, And such further proceedings were thereupon had, that afterwards, at the assizes at Derby on Saturday the 16th of March in the 33 Geo. 3.; the said issue, so joined, &c. was tried by a jury of the county, &c.; and as to the same issue, the jurors of that jury upon their oath said, that the coal mine or vein of coals in the first count of the said hereinbefore recited declaration mentioned, at the time of the making of the indenture of bargain and sale first mentioned in the plea of the said Ellen in the said former suit, were not part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold in manner and form as the said Ellen had in that behalf in pleading alleged; and they assessed the plaintiff his damages 1s. &c. That such further proceedings were thereupon had that the plaintiff in Trinity term 33 Geo. 3. recovered judgment, &c., which judgment is still in force, &c. The replication then averred that the plaintiff and Ellen the defendant named in that record are the same parties as in this suit, and that the said coal mine or vein of coals in that record mentioned, and the said coal mine or vein of coals in the pleadings in this suit mentioned, are one and the same: wherefore the plaintiff prayed judgment if the defendants ought to be admitted against the said record to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold as aforesaid.

To this there was a general demurrer and joinder.

The case was very elaborately argued in Trinity term last by *Clarke* in support of the demurrer, and *Reader* contra; and again in the last term by *Erskine* in support of the demurrer, and *Gibbs* contra; but as all the principal arguments and the cases cited were noticed and commented on by the Court at length in giving their judgment, the repetition of them in this place is unnecessary.

LORD ELLENBOROUGH C. J. now delivered the judgment of the Court.

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This was an action of trespass for digging and getting coals out of a coal mine, alleged by the plaintiff to be within and under

under his close called the *Cow Close*. The defendants plead and shew title regularly brought down to them in right of the wife by fine, recovery, bargain and sale, releases, and descents, from one Sir *John Zouch*, who in the 39th of *Elizabeth* was seised in fee of the manor of *Alfreton*, and of certain messuages, and lands within the manor, under which title they claim all the coals under those lands, *except* such as were within and under any of the messuages, buildings, orchards, and grounds, which, at the time of suffering a certain recovery, suffered in the time of Queen *Elizabeth*, were standing and being upon the said lands and tenements, and which coal mines, with the exception aforesaid, passed under a bargain and sale from Sir *John Zouch* to certain bargainees. And the defendants aver that the coals in question were under the lands of that former owner Sir *John Zouch*, and were derived by bargain and sale to certain immediate bargainees, and from them to the defendant, the wife, and were not within or under any of the messuages, buildings, orchards, and gardens, which are the subject of the exception. To this plea the plaintiff replies, and relies by way of estoppel upon a former verdict obtained by him in an action of trespass, brought by him against one of the defendants, *Ellen* the wife of the other defendant *Henry Case Morewood*, she being then sole; in which he declared for the same trespass as now: to which the wife pleaded, and derived title in the same manner as now done by her and her husband, and alleged that *the coal mines in question, in the declaration mentioned, were at the time of making the beforementioned bargain and sale by Sir John Zouch part and parcel of the coal mines by that indenture bargained and sold*. Upon which point, viz. Whether the coal mines claimed by the plaintiff, and mentioned in his declaration, were parcel of what passed under *Zouch's* bargain and sale to the persons under whom the wife claimed, *an issue was taken, and found for the plaintiff*, and against the wife, one of the two now defendants, (her husband being the other defendant with her in the present action). And the question is, Whether the defendants, the husband and wife, are *estopped* by this verdict and judgment thereupon from now averring (contrary to the title so there found against the wife), that the coal mines now in question are parcel of the coal mines bargained and sold by the indenture above mentioned?

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The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privy, either in estate, or in law, would be equally bound, according to what is said in *Co. Lit.* 352. a. "Privies in estates, as the feoffee, lessee, &c.; privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law in the post, shall be bound by and take advantage of estoppels." The question then is, Is the wife herself estopped by this former finding to aver the contrary? In *Brooke*, tit. *Estoppel*, pl. 15. (who cites 33 H. 6. 7. 19. 50.), (and see also to same effect, *Bro. Estate*, 158. 2 E. 4. 17.), it is said to be "agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land; so that a man may plead this, as party, or as heir, as privy, or by que estate." But if it be said that by the freehold coming in debate must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable, as in an assize, or writ of entry; I answer, that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject matter of such title: and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close, (reported in 3 Leon. 194.) the defendant pleaded "that heretofore he himself brought an *ejectione firme* against the plaintiff of the same land in which the trespass is supposed to be done, and had judgment to recover; and demanded judgment if against, &c. It was moved that the bar was not good, because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another," &c.: *Quod curia concessit*. But as to the matter, the Court was clear that the bar was good. And, by *Periam*, whoever pleaded it, it was well pleaded; for as by recovery in assize the freehold is bound, so by recovery in *ejectione firme* the possession is bound. And by *Anderson*, a recovery in one *ejectione firme* is a bar in another:

another: especially, as *Perium* said, if the party relieth upon the estoppel. And afterwards judgment was given that the plaintiff should be barred. This, it will be recollected, was an action of *ejectione firme*, and not an ejectment moulded and regulated by rules of court as it is at present. The Court very properly distinguished there between what operates by way of bar to a future recovery for the same thing, and what by way of estoppel. That was the case of a mere recovery in *ejectione firme*, *without title alleged*: and the plaintiff might in respect of possession, or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is not *the recovery*, but *the matter alleged* by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.

The authorities upon which a contrary doctrine has been endeavoured to be maintained are the opinions of Lord Coke, as collected from his preface to his 8th report; the resolution and doctrine in the case of *Ferrers*, 6 Co. Rep. 7.; the case of *Inledon and Others v. Burgefs*, 1 Show. 27., and S. C. Comb. 166; to which may be added what passed in court in the case of *Bassett v. Bennett*, upon a motion for a new trial (a) in this court in 1767; and the case of *Sir Frederick Evelyn v. Haynet*, Surry Summer assizes 1782, before Lord Mansfield; and the decision against the estoppel endeavoured to be maintained in *Kinnerley v. Orpe*, Doug. 517. As to the first of these supposed authorities on the subject, viz. Lord Coke's preface to the 8th Report, he there laments the multiplicity of suits in one and the same cause, whereon he says, "Oftentimes there are divers verdicts on the one side, and divers on the other, and yet the plaintiff or defendant can come to no finite end, nor can hold

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" the possession in quiet, though it be often tried and adjudged for
 " * either party." And he adds, " In personal actions, con-
 " cerning debts, goods, and chattels, a recovery or bar in
 " one action is a bar in another; and there is an end of the
 " controversy. In real actions for freehold and inheritance,
 " being of a higher and worthier nature, and standing upon a
 " greater variety of titles and difficulties in law, there could
 " not be above two trials, or at the most (and that very rarely)
 " three; and in the mean time after one recovery the possession
 " rested quiet." The complaint of Lord *Cole* is perhaps with-
 out much foundation, and it is certainly misapplied to the pre-
 sent subject. There must necessarily be a greater or less multi-
 plicity of suits, according to the nature of the suit, and the sub-
 ject on which it operates. The *possession* of land is changed much
 more frequently, and the right to it is capable of an infinitely
 greater number of modifications and interests than the right to
 the *freehold*. The species of action accommodated to the right
 of possession, however acquired, and to injuries in whatever
 manner done thereto, must be of course more frequently called
 into use than other species of action which respect rights of
 property, either founded on entails, or descents from different
 descriptions of ancestors, and the various acts of wrong by
 which such special rights are interrupted or destroyed. The
 judgment, which is the fruit of the action, can only follow the
 nature of the particular right claimed, and the injury complain-
 ed of; and can conclude no further than the existence of the
 right, the injury thereto, and the compensation due for the same.
 In trespass, damages for an injury to possession are the
 only thing demanded by the declaration: the judgment can
 only give the plaintiff an ascertained right to his damages, and
 the means of obtaining them: it concludes nothing upon the
 ulterior right of possession, much less of property, in the land;
 (unless a question of that kind be raised by the plea and a tra-
 verse thereon;) and does not even give him the means of ob-
 taining that possession, for the disturbance of which he has ob-
 tained damages. Neither, however, would a verdict and judg-
 ment in a real action operate by way of bar to future actions
 of trespass, or bring the parties " *to the finite end*" wished for
 by

by Lord *Coke*; because there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right, (I mean a writ of right itself,) a right of possession derived under the owner of the inheritance in fee simple, or those under whom he claims; which may enable a plaintiff in trespass to recover for an injury to his possession, done by the very person in whose favour the absolute right of property shall have been so affirmed in a real action. A judgment, therefore, in each species of action is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land, than the other. What, therefore, Lord *Coke* says, that in personal actions concerning debts, goods, and effects, (by way of distinction from other actions,) a recovery in one action is a bar to another, is not true of *personal actions alone*, but is equally and universally true as to *all actions whatsoever*, quoad their subject matters. And, besides, this doctrine has no material bearing on the present question, which it must be recollected is, Whether an allegation on record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact, once so tried and found?

As to *Ferrer's case*, 6 *Rep.* 7. (and which is to be found also reported in *Cro. Eliz.* 668. under the name of Sir *Henry Ferrers* and two others against *Arden*, with a statement of the facts upon which the resolutions reported by Lord *Coke* are founded); it was an action of trover for an ox, brought by the plaintiffs and another person then deceased, against the defendant, who pleaded a former recovery in trespass for the same cause of action

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brought by the now plaintiffs and the deceased person, against three persons who were, jointly with the defendant, guilty of the conversion complained of; but in which former action the present defendant had not been joined. To this plea the plaintiffs demurred. The Court upon argument was divided, whether the bar were good or not, and no judgment was given; but the matter was ended by arbitration, according to the report in *Cio. Eliz.* The effect of the resolutions in that case, as reported in 6 *Rep.* 7. was, "that the law has provided greater safety and remedy for matters of freehold and inheritance, than for debts and chattels; for there once barred, always barred;" but that in matters of freehold the party may bring an action of a higher nature, and therein try the matter again. Now although it be true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to bind, and as against all such parties as it is competent by law to bind. Upon the complaint made by Lord Coke in his preface to the 8th Report, and which is referred to and again repeated in this report, I have observed already, and again observe, that neither the one or the other of these authorities at all touch the present question, which is that of the effect of a precise allegation made in pleading on record and tried and found between the parties.

The case of *Incedon and Burgefs*, 1 *W. & M.*, as reported in 1 *Show.* 27., *Comb.* 166., and *Carth.* 65., was an action of trespass for breaking a close. Plea, a prescriptive right of common of turbary, &c. Replication, traversing such prescription. The rejoinder by way of estoppel was, that in such a term one of the plaintiffs brought an action of trespass against the defendant, wherein he pleaded the same prescription, and issue tried upon it, and found for the defendant: and demurrer to the rejoinder. According to *Show.*, the argument in favour of the demurrer against the estoppel was, that the parties were different; that there was another plaintiff, who was not party to the former suit: and finally, they took exception to the declaration for not concluding against the peace of both the kings. And on this last objection the Court determined it, and not on the estoppel. The Court, according to *Show.*, gave no judgment on the

estoppel, but only said "an estoppel upon a verdict goes a great way: issue in tail shall never falsify it: but if one man is estopped, and he joins another with him, whether this shall avoid the estoppel is a quære." The report in *Cartbew* only says, the Court gave no opinion as to the matter in law, the estoppel; but judgment was given as to the objection taken to the declaration of *contra pacem domini regis*; and it does not appear to have been argued that it would not have been an estoppel, if clear of other objections. In the report in *Comb.* 166. the argument on the estoppel turned on there being another plaintiff joined. Lord *Holt* says, the meaning "of *Ferrer's* case is, that "it is a bar for the same individual thing; but here is a new "cause of action. 13 *E.* 4. 2, 3, 4. there one trespass is a "bar to another by way of estoppel; that is for taking a villein; "but that is grounded perhaps on the reason of the favour of "liberty, 7 *H.* 6. 8. In trespass on an issue, whether such an "one died seised, a verdict was a bar to another action of trespass by way of estoppel, because there issue was joined on a "matter in the reality. As to the fiction of *Littleton* before "cited, the joining cannot privilege, as a release by one, who "afterwards joins with another; that release is pleadable to "both: if this had been in a real action, where there might be "summons and severance, there it is admitted it would be an "estoppel." *Dolben*, Justice, said, "*Ferrer's* case is not like "this; for here is a new cause of action, a new trespass; but "in *Ferrer's* case it was another action for the same trespass. "And the Court was certainly against *Tremain*" It must certainly be admitted that the present question in substance arose and might have been decided, but was not decided in the above case of *Incedon v. Burges*, and that the decision proceeded on another ground. It appears that *Holt* Ch. J. was aware of the case in 13 *E.* 4. 2, 3, 4. of the estoppel pleaded in the action of trespass for taking a villein; and also of the case in 7 *H.* 6. 8.: but he certainly is not warranted by any thing to be found in the report of 13 *E.* 4., in suggesting that the decision in that case was grounded on any reason in favour of liberty (a): nor, as to 7 *H.* 6. 8. in saying, that the estoppel in that case was suf-

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tained, because *there the issue* (which was on the dying seised of a certain person) was joined on a matter *in the reality*. The only question in the case 13 E. 4. was that which was made by *Catesby, i. e.* upon the identity of the matter in issue. There by partition the villein, who had been regardant to a manor, was allotted with certain lands to one sister in gross, and the manor to the other sister. The ancestor of the villein had answered in the former suit, in which it had been alleged that he was a villein regardant, that he was free and not a villein in manner and form as alleged, and it was so found. And the effect of this finding as an estoppel, which was relied upon by the plaintiff in that suit, (the son of the supposed villein in the former,) was rested in argument, not on the ground that it would be no estoppel if the issue were the same, but on the ground of the issue being different: thereby admitting, that it would have been an estoppel if the issue had been the same: and of that opinion *Brian* and the rest of the Court seem to have been. The case in the Year-book 7 H. 6. 8, 9. was this. Affize was brought against *Popbam* and others, and the plaint was of a mill, with other lands and tenements. And *Popbam* said that affize ought not to be; for one, *J. Popbam* was seised of the tenements, now put in view and plaint, in his demesne as of fee, and died so seised; after whose death plaintiff claimed as by force of a lease made to him by the said *J. Popbam* for term of life; whereas nothing passed by the deed; and demanded judgment. The plaintiff said, *that the father of the tenant had nothing but by the disseisin done to the plaintiff*, and he made *continual claim, and could not enter for fear of death*. To which the tenant said, that at another time *he* brought trespass against the plaintiff, in which the plaintiff justified, because the father of the tenant leased to him for life, and the tenant said that *his father died seised*: and *this was found for the tenant*, and he recovered damages: judgment if he shall be received to defeat this issue once found. *Rolfe*, who argued for the plaintiff that he should not be estopped, said, "he knew well that the plaintiff should not be received to say, *that the tenant's father did not die seised*, which had been tried in the writ of trespass; but to aver a thing which stands well with the first issue, it seems he shall be received; because it does not follow that if he died seised, there-

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fore he died seized of a *good* estate; but we have shewn how he died seized." So that it seems clearly admitted by those who argued against the estoppel, *that the party was estopped as to the very issue found against him*, but not as to other matters consistent therewith, that is, consistent with the fact of dying seized, but avoiding the effect thereof in point of law, (that is, avoiding its effect as a descent to toll an entry,) by the disseisin, continual claim, and non-entry for fear of death as alleged. *Cotesmore* then says, "In writ of trespass of close broken the issue trenches well enough in the reality; as if the defendant justify his entry by reason of inheritance which he has in the freehold; *if this be traversed, this shall be peremptory*: and so it was in our case. *Popham* brought trespass: the (then) defendant pleaded in bar, because of a lease made to him for life, and the plaintiff made title by descent of the inheritance, which was traversed, and found with the plaintiff; which issue was merely in the reality. Wherefore it seems to me that the (now) plaintiff shall not be received now to disturb it." *Martin* says, "As my companion has said, *the issue is as high in a writ of trespass, if taken in the reality, as in an assize*: and if the present plaintiff in the writ of trespass had traversed the descent as he did, and it had been found with the plaintiff, and *the plaintiff had also brought trespass*, should he be permitted to avoid the descent, by such descent as he has now done? I say not. *No more shall he be received in this assize, where the plaint is of the same tenements*." The case came on again, 7 H. 6. fo. 20. when *Martin* said he thought the plaintiff should be estopped to avoid the descent, for this was found once against him with the now tenants, upon which they recovered their damages; and for this the descent, which was the cause of the judgment, and upon which judgment was given, ought to be understood to be a good descent, and especially per ent. primes. And there was a like case, where a release was pleaded in bar, and the plaintiff said it was made by duress of imprisonment, and was afterwards nonsuit, and brought a new writ, and the release was again pleaded in bar; and he would have avoided the deed, because it was made at a time when he was within age, and he was not received so to do; for that when he had said the deed was made by duress, &c. he

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acknowledged it to be good in all points but *that*. Likewise in this case, when the descent is found against the plaintiff, it shall be holden as acknowledged by him; and if so, it is to be understood as well acknowledged, as at this time other matter was not shewn. *Cokain* contended that the continual claim was *contrary to the issue*; wherefore the averment could not be received. But *Strangways* (who was a Judge) said it was not contrary, and that the averment might be received. And he thought that the inquest had only to inquire if *J. Popbam* the father died *seised in fact*, which they had done; but the matter of law arising from the continual claim was not in charge to them. And that it seemed to him a marvellous thing to intend a matter upon a verdict necessarily, of which, nevertheless, the inquest had not power to inquire." So that it seems clear that *Strangways*, who differed from *Martin*, thought the finding was an estoppel as far as it went. *Bro. tit. Estoppel*, 77., says, in his abridgment of this case, which was not decided, "*Optima opinio* was that it was a good estoppel:" and concludes, "*sic vide, issue tried in action of trespass, and judgment given upon this, is a good estoppel in a real action.*" By this case it appears to have been on all sides then admitted in argument, that an issue taken and found upon a traverse of a precise fact, material to the right in question, in an action of trespass, is equally peremptory by way of conclusion as to that same fact, and upon the same right, between the same parties in an assize. The authorities, therefore, which Lord Holt referred to in *Incleton v. Burges* would, if further examined, have warranted the Court (supposing the difference of parties to have opposed no objection to their so doing) in then giving a judgment upon the point now in question, as well as upon the other point, of *contra pacem*, &c. on which it was actually given.

As to the case of *Basset v. Bennett*, in which a new trial was moved for, because a verdict was taken for the defendant, both on the general issue and on the plea of *liberum tenementum*; whereas there was only evidence to support the finding for the defendant on the general issue; and where the new trial is said to have been refused, because the Court held that the finding on the *liberum tenementum* would not prejudice the plaintiff, as a judgment in a possessory action was not conclusive on real rights.

rights. If it were indeed so laid down by the Court, the doctrine must certainly be received with some degree * of qualification and allowance. The plea would be conclusive, that at the time of pleading the plea the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was found, from again alleging the contrary. But if not brought forward by plea, as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found; but not conclusive between the parties, as an estoppel would be. In that case the proper course would certainly have been for the Judge at the trial to have discharged the jury from finding any verdict on the plea of liberum tenementum, on which no evidence was given.

As to the other case relied upon by the plaintiff, of Sir *Frederick Evelyn v. Haynes*, which was a second action for obstructing a watercourse, tried before Lord *Mansfield*, upon a plea of not guilty, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same watercourse was given in evidence: Lord *Mansfield* held, very properly, that the plaintiff had not obtained such a determination of his right by the former verdict as the law considered as conclusive. It could only be conclusive upon the right, if it could have been used and were actually used in pleading, by way of estoppel, which it could not be in that case: first, Because no issue was taken in the first action upon any precise point; which is necessary to constitute an estoppel thereupon in the second action: secondly, It was not even *pleaded* by way of estoppel in the second action, but only offered as *evidence on the general issue*: and in order to be an estoppel it must have been, as already observed, pleaded as such, by apt averments.

As to the case of *Kinnerley v. Orpe*, it is extraordinary that it should ever have been for a moment supposed that there could be an estoppel in such a case. It was not pleaded as such; neither were the parties in the second suit the same with those in the first. The doubt seems rather to be, Whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action for penalties for fishing, under the flat.

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stat. 5 Geo. 3. c. 14. s. 3, 4. against the defendant, who was no party to the former action, than as to any conclusive effect it could have had, if pleaded by way of estoppel, which, however, it was not in that case.

None of the cases, therefore, cited on the part of the plaintiff negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties, or their privies. The cases adverted to by Lord Holt, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities on the subject of protestation and estoppel, cited from *Bro. Abr. Protestation*, pl. 9. *Fitzberbert*, *Estoppel*, pl. 20., are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive, that the husband and wife, the defendants in this case, are stopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that *the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch*; and consequently that the plaintiff ought to recover.

Judgment for the Plaintiff.

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Friday,
Feb 11th.

M^dDANIEL and Another against HUGHES.

A garnishee, against whom a recovery was had in the mayor's court in foreign attachment after a summons to the defendant and nihil returned, may protect him-

THE plaintiffs brought assumpsit to recover from the defendant 3600*l.* for money had and received by him to their use, as their agent or broker, from certain underwriters for insurance upon the cargo of a certain ship, in the year 1798. The defendant pleaded non assumpsit, with which he delivered notice of set-off. The cause was tried before Lawrence J. at Westminster on the 23d of February 1802, when a verdict was found for the plaintiffs, damages 2100*l.*, subject as to the set-off to the award of R. B., and subject to the opinion of this Court, whether the

self by giving such proceedings in evidence upon non-assumpsit in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands. Although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee.

plaintiffs

plaintiffs were entitled to recover 1500*l.* part of the said 2100*l.*, under the circumstances stated in the following case.

The plaintiffs proved at the trial that in *February* 1798 they employed the defendant to effect an insurance upon goods by the ship *Guglielmino*, which was accordingly done, to the amount of 3600*l.* against all risks. That the vessel proceeded on her intended voyage from *Leghorn* to *Chester*, but was captured by a *French* ship of war, and carried into *Bastia* in *Corfica*, where the ship and cargo being condemned, the underwriters became liable to pay to the plaintiffs the said sum of 3600*l.*, which, or at least sufficient to cover the said 1500*l.*, was paid into the defendant's hands for the plaintiff's use by the underwriters, at different payments between the 31st *January* and the 1st of *June* 1800. The defendant gave in evidence the record or minutes of proceedings on an attachment in the mayor's court of the city of *London*; whereby it appeared (a).

" That on the 7th *January* 1800 *John Patten* and others levied their plaint in the said court against *William M'Daniel*, *Charles Terreni* and Co. (the said *M'Daniel* and *Terreni* being the plaintiffs in this action) in a plea of debt therein, demanding against them 3000*l.* and swore to a debt of 1500*l.* and upwards; and thereupon prayed the process of the Court, which was granted: upon which it was commanded by the same Court to one of the serjeants at mace of the said court that he should *summon* the said then defendants to appear in that court, to answer the said then plaintiffs in the plea aforesaid. That afterwards at the same court the said serjeant at mace returned that the then defendants *had nothing* in the said city or the liberties thereof whereby they could be summoned, *nor were to be found* within the same. And at the same court the then defendants were solemnly called and did not appear, but made default. That at the same court it was alleged by the then plaintiffs that *J. T. Hughes* the garnishee (being the defendant in this action) *owed* to the then defendants 1500*l.* in monies numbered, as the proper monies of the then defendants, *and then had and detained* the same in his hands and custody; and therefore the then plaintiffs prayed process to

(a) The proceedings at large were referred to in and accompanied the case.

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attack the said then defendants by the said 1500*l.* so then being in the hands and custody of the said garnishee as aforesaid, so that the said then defendants might appear in the court to answer the said then plaintiffs in the plea aforesaid. Whereupon it was commanded by the same Court to the said serjeant at mace that he should attach the then defendants by the said 1500*l.*, so being then in the hands and custody of the said garnishee as aforesaid, and the same in his hands and custody defend and take, so that the said then defendants might appear in that court to answer the then plaintiffs in that plea. That afterwards at the said mayor's court, holden on the 13th of *January* aforesaid, the then plaintiffs appeared, and the serjeant at mace returned, that he by virtue of the said precept on the said 7th of *January* had attached the then defendants by the said 1500*l.*, therein stated as then being in the hands and custody of the said garnishee, so that they might appear to answer the then plaintiffs in the plea aforesaid. That the then defendants, although solemnly called in the same court on four several days, that is to say, on the 13th, 14th, 23, and 24th of *January* aforesaid, did not come, but made default on each of those days, which were recorded against them: and thereupon afterwards the then plaintiffs prayed process to warn the said garnishee to appear in the court to shew cause, &c. Whereupon at the same court it was commanded by that Court to the said serjeant at mace, that he should warn and make known to the said garnishee that he should appear in that court to be holden on the 27th of *January* aforesaid, to shew cause why the then plaintiffs ought not to have execution of the said 1500*l.* so attached in his hands and custody as aforesaid. At which court so holden, &c. the said serjeant at mace returned, that he by virtue of the said last mentioned precept had warned and made known to the said garnishee to appear at that court to shew cause, &c. And thereupon at the same court the said garnishee appeared and had leave to imparle. That the said garnishee on the 13th of *November* 1801 pleaded in the same court, that the then plaintiffs ought not to have execution against him of the said 1500*l.* in monies numbered so attached as aforesaid, or of any part thereof; because he said that *at the time of making the said attachment, or at any time since*, he had not owed to or detained from, or then had owed

owed to or detained* from the then defendants the said 1500*l.* or any part thereof: and thereupon issue was joined. That on the 25th of *November* 1801 this issue came on to be tried in the said court of the mayor, when a verdict was found that at the time of making the attachment aforesaid the said garnishee owed to and detained from the said then defendants the sum of 1500*l.* in monies numbered as the proper monies of the then defendants. That judgment was thereupon given by the said Court, that the then plaintiffs should have execution of the said 1500*l.* in monies numbered, so attached and found by the jury as aforesaid, by pledges if, &c. and process for the remainder. And thereupon the said plaintiffs found sufficient pledges to restore, &c. and a precept being delivered, the then plaintiffs had execution, and thereof acknowledged themselves satisfied."

That it did not appear by the said record or minutes of proceedings that the then defendants or either of them had ever been *summoned to appear* in the said court. That the present defendant gave in evidence at the trial of this cause a letter written by the said *W. Mac Daniel* to the defendant, bearing date the 19th of *September* 1801, wherein the said *W. Mac Daniel* alluded to the said attachment by saying, "if it should be in our power to rise the attachment, can we depend on your goodness to pay us, or accept bills for the amount immediately after the same is done? But no evidence was given of the plaintiffs in this cause or either of them having had any knowledge of the said attachment, except the same can be and as far only as it can be collected from the said letter; *nor was any evidence given that the plaintiffs owed the said Patteson and others the said 1500*l.* or any part thereof.* The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover the said sum of 1500*l.* so paid by the said underwriters into the defendant's hands for the plaintiffs' use as aforesaid?

Barry, for the plaintiffs, contended that the proceedings stated in the mayor's court were wholly irregular and void à principio, and not binding on the present plaintiffs. Three parties are necessary in a proceeding on foreign attachment, the plaintiff, the defendant, and the garnishee. The plaintiff must prove his debt; the defendant must have due notice of the process against him;

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him; and the garnishee must be in the actual possession of that property of the defendant's which is to be attached: neither of which is made out in this case, and therefore the plaintiffs are entitled to recover. First, it appears upon the state of the case that the defendant, the garnishee below, had not in fact received the plaintiffs' money at the time when the attachment issued, which was on the 7th of *January* 1800, returnable on the 13th; for the property did not come into his hands till between the 31st of *May* and the 1st of *June*: but an attachment cannot be of goods in which the party had no property at the time. 17 *Ed. 4. p. 7.* and *Bro. Abr. dette. pl. 163.*; nor of a debt, before it is due, *Dalton v. Smelley (a)*; nor can it charge any other than the debtor himself, *Masters v. Lewis (b)*. So in *Brook v. Smith (c)* it was holden that condemnation in foreign attachment, after the action commenced by the creditor in the superior court, but before plea pleaded, cannot be given in evidence on non assumpsit, but ought to be pleaded in bar. [*Lawrence J.* That is contradicted in *Savage's case (d)*.] So is the case of *Wills v. Needham (e)*: but there it seems that the recovery must have been had before the action commenced above. Now here it appears that this cause was tried in *February* 1802, and the nisi prius record will shew that the action must have been commenced prior to the 23th of *November* 1801, when the recovery was had in the mayor's court. Secondly, the defendants below had not due notice of the attachment, and therefore ought not to be prejudiced by the verdict and judgment, which they had no opportunity of controverting. *Lewis v. Clarges (f)*. And in *Smith v. Ridges (g)* the return of *nil habet, nec est inventus*, against the defendant below, was holden not to be within the custom, and therefore not binding upon him as a notice to defend. And again, in *Fisher v. Lane* and others (*b*), where the proceedings in the mayor's court appeared to have been the same as here, the Court of C. B. gave judg-

(a) *Cro. Eliz.* 184.

(b) 3 *Salk.* 49.

(c) 1 *Salk.* 280.

(d) 1 *Salk.* 291.

(e) *E. 9 W. 3* cited in 2 *Lutw.* 995.

(f) *Gilb. Law of Evid.* 25.

(g) *T. Jon.* 165.

(b) 3 *Wilf.* 297.

ment for the plaintiff on the ground that no notice had in fact been given to her to come in and defend herself against the attachment. [Lord *Ellenborough* C. J. There is a very essential difference between that book and the report of the same case by Mr. Justice *Blackstone* (a), where Lord C. J. *De Grey* assigns as the reason for the decision, that the judgment in the mayor's court did not appear to be such as fell within the custom; there being no summons of the defendant *Fisher*, nor any return of *nihil*, &c. Now here there is a regular return of *non est inventus* and *nihil*, appearing upon the face of the proceedings, which shews that the party was not forthcoming, and had nothing whereby he could be attached to answer; and therefore assigns a reason why he could not be summoned.] Thirdly, the plaintiff below proved no debt due from the defendants below, the present plaintiffs, which is required both by law and reason before a party can be entitled to recover; and no custom which dispenses with such proof can be good. [Lord *Ellenborough*. There is no issue on the plaintiff's debt in the mayor's court, as between him and the garnishee, when the defendant does not come in and defend.—*Le Blanc* J. The only way in which that can come in issue between them, is by the garnishee appearing and putting in bail.—*Große* J. The attachment is meant in the first instance to compel appearance.] In *Hatton v. Isenonger* (b), where the defendant pleaded a recovery in foreign attachment, the custom was laid to be that the plaintiff should swear to his debt; for want of which the Court held the exception fatal on demurrer. And in *Coke v. Brainforth* (c), and *Paranour v. Pain* (d), on a similar plea, the Court on demurrer held that the debt was traversable. Now here the present plaintiffs had no opportunity below of traversing the debt, and therefore the defendant ought to have proved it here; especially as by putting in bail below he could have driven the plaintiff there to have proved his debt. And in *Palmer v. Hook* (e) this very point was ruled by *Holt* Ch. J. at Nisi Prius, that upon non-*assumpsit* for goods sold and delivered, if the defendant give in evidence that the debt was attached by foreign attachment in *London* upon a plaint levied by *J. S.* (to whom the plaintiff was indebted) against the

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(a) 2 *Blas.* 634. (b) 1 *Swa.* 641. (c) *Cro. Elm.* 830.(d) *Ib.* 558. (e) 1 *Ld. Raym.* 727.

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plaintiff, the defendant will be driven to prove that the plaintiff was indebted to J. S., because the plaintiff had no notice of the foreign attachment; and therefore it may be only a contrivance between the defendant and J. S. to bar the plaintiff of his present action.

Giles contra. The proceedings in the mayor's court in this instance have been according to the long established usage of that court, and part of the custom of foreign attachment recognized by the Courts of *Westminster*. If the property of the defendants below be found to have come into the hands of the garnishee before plea pleaded, it is liable to be attached by the custom. [The Common Serjeant, as Amicus Curie, asserted such to be the constant practice: and observed, that there was no inconvenience in it; for if the garnishee came in immediately and pleaded, he got rid of the attachment at once; but if he chose to wait, it was reasonable that he should answer up to the time when he came in; otherwise he would be liable to be harassed with new attachments till the expected property was fixed in his hands.] This is recognized as part of the custom in 1 *Com. Dig. tit. Attachment, C. p. 451.* "If goods come to the hands of the garnishee after an attachment granted in the mayor's court, they may be attached." For which he cites *Privil. Lond. (a)*. There it is said, "If A. attach the money or goods of M. in the hands of R. in the mayor's court; and if R. have no money or goods in his hands belonging to M. at the time when the attachment shall be made; and six months after R. shall become indebted to M., or have goods in his hands belonging to M., the plaintiff A. by virtue of the attachment made as aforesaid, shall recover the money or goods he shall prove came to the hands of R. after the attachment made; the general issue upon all attachments being, Whether the garnishee at the time of the attachment made, or at any time after, had any money or goods of M. in his hands?" Now here, though the attachment issued on the 7th of *January* 1800, before the money received, which was not till between the 31st of *January* and the 1st of *June*, yet it was all received before plea pleaded by the garnishee, the present defendant, which was not till the 13th of *November* 1801.

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- (a) The page referred to is 197, but in my edition, which is the third, it is 255.

[The

[The Court having at first intimated great doubts whether an expectation of a debt could be attached, and referred to *Dalton v. Smelley* (a) as seeming to contradict the custom as stated in *Privil. Lond.*, in which case it is said to have been ruled that a foreign attachment could not be of a debt before it was due: he answered] It is probable that *Dalton v. Smelley* was the case of a debitum in presenti solvendum in futuro, which it was at one time doubted whether it could be attached, though it has often since been holden that it may. This proceeding bears some analogy to the plea of plenè administravit, which contains an averment that the defendant had no assets at the time of the action commenced or at any time afterwards; which latter words are necessary to be added, according to *Getten v. Roll* (b). Secondly, As to the objection of want of notice to the defendants below, (the now plaintiffs,) he had the usual notice, namely, an order to summon him; and a return of nihil thereupon; which is recognised to be the proper course of proceeding by what is said in Mr. Justice *Blackstone's* Report (c) of *Fisher v. Lane*, which differs materially from that by *Wilson*, as before noticed by the Court. However, if notice to the defendants below were necessary to exculpate the garnishee, such notice is to be inferred from their letter of the 19th of September 1801. And even after judgment in the mayor's court against the garnishee, the defendants below would have been let in to defend on putting in bail within a year and a day. Thirdly, As the judgment in the mayor's court is a judgment against the defendant below as by default, there is no issue there, as between the plaintiff below and the garnishee, upon the plaintiff's debt; so that the garnishee has no means of compelling the plaintiff to prove it, except by appearing and putting in bail for the defendant; by which he must make himself responsible to the bail to pay the debt at all events in case it should be found for the plaintiff; for the bail below are answerable for the debt, and not merely for the defendant's appearance. But he certainly is not bound to do this, and cannot be deemed guilty of laches for the omission of it. Then not being cognizant of the plaintiff's debt, it would be very unjust to subject him to the proof of it without any means of substantiating it. The only question as to the

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(a) *Cro. Eliz.* 184. (b) *Cro. Jac.* 132. (c) 2 *Blac.* 836.

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garnishee is, Whether he had the property of the defendants below in his hands at the time of pleading to the attachment? The case of *Hatton v. Ifmonger* (a) does not apply; for there the question only turned upon a variance between the plea and the custom set forth. The cases of *Paramour v. Pain* (b), and *Coke v. Brainforth* (c), where the debt of the plaintiff below was holden to be traversable, where the money of the defendants was attached by the plaintiffs below in their own hands. In the case indeed of *Palmer v. Hook* (d), it may be collected that the plaintiff below and the garnishee were different persons; but that case stands alone, and is contrary to reason and justice. Here the now plaintiffs might have disputed the debt with the plaintiff below by appearing and putting in bail long after they had notice of the proceedings, as appears by the letter of the 19th of September. But so long as the judgment below remains unreversed by error it must be a protection for the defendant, who has been compelled to pay the money once by legal process which he could not resist.

Barry, in reply, said that the analogy to the plea of *plenè administravit* did not hold in respect of proceedings in the mayor's court; because there the plaintiff suing an administrator was not only entitled to assets at the time of the action commenced but *quando acciderint*, which was an anomalous case. That no custom could legalize that which was plainly contrary to reason and justice, as is admitted in 22 *Ed. 4.* 67. with respect to the customs of *London*, though confirmed by parliament; and one of the first principles of justice is, that no one shall be condemned without notice and having an opportunity of defending himself. And restrictions have been put upon the generality of the custom of foreign attachment by this Court in *Coppel v. Smith* (e), and *Grant v. Hawding*, there cited; where it was holden that money directed to be paid by the Master's allocatur, and even money awarded under a rule of Court, cannot be attached, it being in contravention of judicial orders; though the custom has been generally certified to be that all debita in presenti solvenda in futuro are attachable.

Cur. adv. vult.

- (a) 1 *Stra.* 164. (b) *Cro. Elin.* 598. (c) *Id.* 830.
(d) 1 *Ld. Ray.* 727. (e) 4 *Term Rep.* 312.

Lord

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. After stating the case,

* It was objected on the part of the plaintiffs, that the defendant could not avail himself of the judgment recovered against him in this case in the mayor's court as garnishee; first, because he, the garnishee, had not received and did not owe to the defendants below (the plaintiffs in this suit) at the time of the attachment any part of the money for which the attachment was levied: the attachment being laid on the 7th of *January* 1800, and the money being by the case stated to have been received at a time subsequent, viz. between the 31st of *January* and the 1st of *June* 1800. The second objection was, that the defendants below, (the plaintiffs here), had not due notice of the proceedings in the mayor's court against them. Thirdly, That the plaintiff below had not proved his debt against the defendants below (who are the plaintiffs here).

As to the first, it cannot be necessary to prove more on the plea of non-assumpsit than is required to be averred if the attachment had been specially pleaded; in which case it would be sufficient according to the certificate of *Starkey* the Recorder, 22 *Ed.* 4. 30. *b.* (also in Mr. Serjt. *Williams's* Note on *Turbill's* case, 1 *Sand.* 67. *a.*) to have averred that the plaintiff below levied his plaint, that *nil* was returned to the defendants on that suit, on which the plaintiff surmised, that the now defendant, the garnishee below, owed the plaintiff below a sum of money, and prayed that the then defendants might be attached by it, &c. with which required facts and circumstances (and they are the whole of the matters certified by *Starkey* as forming the ground for an attachment of a debt in the hands of the garnishee) the proceedings in the mayor's court, together with the admitted facts of this case, entirely coincide and agree. So that it appears that the proceedings have been strictly regular according to the custom: and it can be only on the grounds of the Court's seeing that those proceedings are void, (and these certainly are not so upon the face of them), that the judgment of the Court below fails of being a bar to an action for the recovery of the same sum in another court. If the proceedings are not void, the jury there having found a verdict, contrary to fact, as stated in the case, in finding that the garnishee owed the money at the time of the attachment, such statement cannot

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not thereby deprive the garnishee of this defence : for if it could do so, he would be liable to pay over again that money, which, after the judgment against him in the mayor's court, he could have had no means of retaining in his hands : which would be a degree of injustice that the law of the land, which allows of such a custom, will not suffer to result from the application of it. The case cited of *Smith v. Ridger*, Sir Thomas Jones, 165. was the case of a custom not pursued as laid, and wholly decided on that ground, and has no bearing on the present question. And so was the case of *Hatton v. Ifemonger*, 1 *Str.* 641. There the custom had been laid that the plaintiff should swear to his debt, and the garnishee in pleading it did not shew any oath. This amounts to no more than a failure in proving the custom as laid, which is fatal upon the principle laid down in *Morris v. Dudlam*, 2 *H. Blac.* 362. but it does not prove that such was the custom, or that independently of the allegation the law required any such proof. *Paramour v. Pain*, *Cro. Eliz.* 598. was the case of an attachment by the defendant above of the plaintiff's debt in his own hands : and therefore as between such parties the debt, which was also expressly alleged to be due, might be well traversable. The case of *Coke v. Brainforth*, *Cro. Eliz.* 830. was where the defendant pleaded that the plaintiff was indebted to him, and *concessit solvere*, and pleaded a foreign attachment in *London*, which seems to have been like the former, an attachment by the defendant for his own debt in his own hands ; but whether it were so or not, the existence of the debt was substantially alleged in his plea, and therefore at any rate on the ground of such allegation the debt was traversable. As to the case in *Lord Raymond*, 727, before Lord Holt at nisi prius, there must have been some mistake in that report ; for it would defeat the whole effect of the custom of foreign attachment if the garnishee should, without means of proving it, be obliged to prove the debt of the plaintiff below in his own defence here, such plaintiff not having been before by the terms of the plea required to do so in the court below. If it were ever necessary, however, it could not be so in the present case, where the defendants below had notice to defend, and neglected the defence, or rather neglected the bailing of the debt in the action below. It will be recollected that the frame of the record in the court below

below and the fact found by the verdict make it in this case wholly unnecessary to decide whether the custom of foreign attachment extends to debts as between the garnishee and the defendant below (not being of the particular description of debita in presenti solvenda in futuro) which have not become actually due at the time of the attachment laid. Our decision, therefore, leaves that question (supposing the fact had so appeared upon the face of the record below) wholly untouched.

Judgment for the Defendant.

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BORTLINGK and Others *against* INGLIS and Others, Assignees of
CRANE, a Bankrupt.

Friday,
Feb. 11th.

THIS was an action of trover to recover the value of 100 casks of tallow, which was tried before *Le Blanc J.* at the Sittings after last *Hilary* term at *Guildhall*, when a verdict was found for the plaintiffs for 2200*l.*, subject to the opinion of the Court on a case reserved; the short statement of which is as follows: On the 13th of *September* 1798 a merchant in *London* of the name of *Crane* entered into the following contract in writing with Captain *Usherwood* of the ship *William*: "Memorandum for charter, *London*, *Sept.* 13th, 1798. It is this day mutually agreed" between the parties, "that the ship shall proceed to *St. Petersburg*, and there load from the factors of *Crane* a complete cargo of stowage goods," &c. "and therewith proceed to *London* and deliver the same, on being paid freight 20*s.* per ton for tallow, (and so on in certain proportions for other goods); one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in three months following. Twenty-five running days are to be allowed *Crane* (if the ship is not sooner dispatched) for loading the ship at *St. Petersburg*, and 25 run-

A trader in *England* charters a ship on certain conditions for a voyage to *Russia*, and to bring goods home from his correspondent there, who accordingly ships the goods on account and at the risk of the freighter, and sends him the invoices and bills of lading of the cargo: held that the delivery of the goods on

board such chartered ship does not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. And a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded; after which he delivered them to the assignees of the vendee, held that the consignor might maintain trover against the assignees.

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“ning days for delivering at *London*, and 10 days on demurrage
“over and above the said laying days at 5*l.* per day. Penalty
“for non-performance 1000*l.* The captain to sign bills of
“lading for the cargo, &c. and to address Messrs. *Bohtlingk*
“and Co. *St. Peterburgh*.” On the 15th of *September* 1798
the ship sailed from *London*, and afterwards arrived at her place
of destination.

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Then followed in the case a long detail of the correspondence
between the plaintiffs and *Crane*, which, having been before
stated in the report of the case of *Inglis* and others, assignees of
Crane, v. *Usherwood* (a), it is unnecessary here to repeat. It will
be sufficient to add to the general statement there given what
relates more particularly to the tallow in question. By letter
dated *St. Peterburgh*, the 16th of *October* 1798, the plaintiffs
wrote to *Crane* the bankrupt, acknowledging the receipt of his
letter of the 15th of *September* by the ship *William*, Captain
Usherwood, who was just arrived; and adding, “we have been
“fortunate enough to purchase 100 casks of the best soap tal-
“low, consisting of two parcels at 64 rubles. But Messrs. *C.*
“and Co. inform us very positively that they will in nowise be
“able to execute your order for 100 casks; for they will only
“buy *Siberia* tallow, which according to the most recent ad-
“vices will not arrive till towards the end of this month. Those
“gentlemen have therefore, in order not to expose Captain
“*Usherwood* to a possibility of passing the winter here, decided
“not to give him any tallow; which renders it necessary to
“have recourse to complete the ship with deals. We have
“already agreed upon that matter with Captain *Usherwood* upon
“the same terms as those made with Captain *Reed*.” On
the 18th of *October* 22 casks of the tallow in question were
shipped on board the *William*, and the remaining 78 casks on
the next day; of which the plaintiffs informed *Crane* by a letter
dated the 19th; containing further, “When Captain *Usher-*
“*wood* arrives in *London* you will have the goodness to arrange
“matters with him in the same manner as we have done with
“Captain *Reed*, calculating how much tallow he could have
“loaded in lieu of the deals. We have shipped for the account
“of Messrs. *Schneider* and Co. per the abovementioned ship

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(a) *Ante*, 1 vol. 515.

“*William*,

" *William*, six casks of fur, and request you to settle the freight
" with those friends." The two invoices of the tallow shipped,
50 casks each, were thus intitled;

" *St. Peterburgh, 19th Oct. 1798.*

" Invoice of 50 casks of tallow for soap, first quality, bought
" for ready money, and put on board a lighter under the mark
" and number as *per* margin, for the ship the *William*, Captain
" *R. Usherwood*, for *London*, for account and risk of *Mr. C. T.*
" *Crane in London.*"

In each of the invoices the plaintiffs charged 1 per cent. for
brokerage, extra charges, and 2 per cent. commission; and at
the foot of each are the following words; " We debit your
" account current for the amount." The bill of lading for the
tallow is dated the 22d of *October*, and directs the tallow to be
delivered " to *Mr. C. T. Crane*, or to his assigns, he or they paying
" freight for the same as *per* charter-party." On the 26th of
October the plaintiffs wrote to *Crane* a letter, in which they say,
" The present serves to hand you inclosed bill of lading for
" 100 casks of tallow per the *William*, Captain *Usherwood*; the
" other bills of lading will follow in our next." After sending
off to *Crane* one part of the bill of lading for the tallow, the
plaintiffs having received information of his insolvency, they
sent another part of the bill of lading to *John Schneider* their
agent or correspondent in *London*, which was received by him,
and who made insurance on the tallow for the plaintiffs on the
22d, 23d, and 27th of *November* 1798, and which tallow *Crane*
had previously ordered to be insured: but on his failure, and
previous to such insurance being effected, the broker declined
to execute the order for the insurance. And on the 30th of
October the plaintiffs wrote to *Crane* under cover to *Schneider*
the letter which is set forth at large in the first report of the
case (a); stating in substance their former doubts of his solidity
and dissatisfaction with his correspondence: their surprize at his
order for the goods by the *William*, Captain *Usherwood*, of which,
out of regard to his interest, they should have preferred the non-
execution, and sacrificed their commission if the engagement
made by him with the captain had not compelled them to give
him his loading. That they, the plaintiffs, had remitted him

(a) *Ante*, 1 vol. 517, 518.

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(*Crane*) by the last post the bill of lading for the 100 casks of tallow, but having since received alarming intelligence of his situation, they requested him to furnish *Schneider* with sufficient security for the amount of the goods by the *William*: on which condition only they authorised *Schneider* to deliver him (*Crane*) the bills of lading of the hemp, iron, and deals they were going to send. And then they add, "In the contrary case you will have the goodness to deliver him (*Schneider*) without delay the bill of lading indorsed for the 100 casks of tallow, of which he holds the duplicate. Afterwards Mr. *Schneider* will make use of those documents to receive the cargo in question, and effect the sale thereof for your account, employing the proceeds thereof in acquitting the bills of about 36,000 rs. which we shall draw on you in a month," &c. Several other letters to the same effect were sent from the plaintiffs to *Crane*, which are also stated in the former report: In one of these, dated 2d November, they say, "We send this day to Mr. *Schneider* the bills of lading for the iron, hemp, and deals, per the *William*, Captain *Usherwood*; If you will then fulfil the condition we made to you, to give Mr. *Schneider* the needful security, he will deliver to you all the bills of lading; if not, he will receive from you the bill of lading for the 100 casks of tallow, and on arrival of the ship receive her cargo, and afterwards procure the sale thereof for your account." The tallow in question was, on the ship's arrival at London, viz. on the 31st of December 1798, demanded of the captain of the *William* on behalf of the plaintiffs, and before it was taken possession of by the defendants, and was regularly demanded of the defendants, and a tender of freight, expences, and charges made on behalf of the plaintiffs before this action was commenced; but the defendants did not deliver the tallow to the plaintiffs. *Crane* committed an act of bankruptcy in England before the tallow in question was delivered on board the *William* in Russia, but not before the purchase of it on his account, viz. on the 16th of October 1798, and a commission of bankrupt afterwards issued against him, upon which he was declared a bankrupt, and the defendants were chosen his assignees. On the 4th of January 1799 Captain *Usherwood* delivered the tallow in question to the defendants (under the bill of lading thereof sent by the plaintiffs to *Crane*, and

and which was received by the defendants) upon being indemnified by the defendants.

By one of the mercantile navigation laws of *Russia*, published the 25th of *June* 1801, (*f.* 138.) "It is ordered, that if, in case of unpaid debts or bankruptcies, any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loaded on board of ship or vessel goods or cargo, in such a case the creditor is to give notice in town to the head judge of the court, in districts to the chief, that the ship or vessel, or goods, or the whole cargo should be *retained time enough*, until the full payment is made to whom due."

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The judges of the custom-house court of *St. Peterburgh* have given the following opinion on the above-mentioned law; which was read at the trial, subject to the opinion of this Court as to its admissibility. "By his Imperial Majesty's ukaas and resolution of the custom-house court of *St. Peterburgh*, this attestation is given to the *St. Peterburgh* merchants of the first class, *Bobtlingk* and Co., upon their request; that concerning a suit at law having in *London* with the *London* merchant *T. Crane*, they wanted an attestation of the 138th S^a in the mercantile navigation laws, and that this law is generally received and acted upon; wherefore they demanded a testimony of this tenor. That the seller or shipper of merchandize, if he have reason to suspect the circumstances of the purchaser or consignee, and being not yet paid for this merchandize, has a right, by virtue of the said law, to *reclaim and take back this merchandize out of the ship in which it may be loaded*, although the bills of lading were already transmitted, and *without regarding that the ship has been chartered abroad or here, or out of the house, warehouse, or any other place belonging to the purchaser; and that the merchandize must be given back to the seller or shipper*, and is not brought in concurs. And whereas it is ordered in the abovementioned mercantile navigation laws, published the 25th of *June* 1781, in the 138th S., If in case of unpaid debts or bankruptcies any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loadeth on board of ship or vessel, goods or cargo; in such a case the creditor is to give notice in town to the head judge of the court, in districts to the

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"chief,

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" chief, that the ship or vessel, or goods, or the whole cargo,
 " should be retained time enough until the full payment is made
 " to whom due. In consequence whereof, and by virtue of
 " this law, if the seller or shipper, in case of bankruptcies, can
 " identify that this merchandize belonging to him is here in
 " ship, warehouse, or wherever they may be, in such a case the
 " goods must be given back to the seller or shipper, being his
 " property, and cannot be brought in concurs. In considera-
 " tion whereof this attestation is given to them *Bontlingk* and
 " Co. Underwritten, by the presiding judges, and sealed by
 " the seal of the *St. Petersburg* custom-house court, the 25th
 " *September* 1800." (Signed by three judges.)

The questions for the opinion of the Court were, 1st, Whether the opinion of the judges of the custom-house court above stated were admissible evidence? If not, it is to be struck out of the case. 2dly, Whether the plaintiffs were entitled to recover? If the Court should be of opinion that they were, the verdict for the plaintiffs was to stand, and to be entered up for such damages as the defendant *Mr. Inglis* and *Mr. Schneider* shall agree upon. If the Court should be of opinion that the plaintiffs were not entitled to recover in this action, then a nonsuit to be entered.

This case was argued in the last term by

[388] *Marryat* for the plaintiffs, who compared it to the case of *Inglis v. Usherwood* (a), which arose out of the same transaction. Upon the first question reserved he contended very shortly, that the certificate of the opinion of the judges of the custom-house was admissible in evidence, not simply as a report of the opinion of the Court, but as an adjudication of the law certified under the seal of the court, and therefore entitled to the same credit as the exemplification of a foreign judgment. Secondly, Upon the general question of the right of stopping in transitu, he contended, that upon a review of all the cases such a right existed by our law in the consignor or vendor even after a delivery of the goods on board a ship chartered by the vendee: and that that rule was not broken in upon by the case of *Fowler* and another, assignees of *Hunter and Co. v. McTaggart and Co.* (b), cited in the last-mentioned case, which was very distinguishable

(a) *Ante*, 1 vol. 515.

(b) *Ante*, 1 vol. 522.

from

from the present. There the ship had been chartered by the bankrupts for three years. They had as absolute a control over her at the time as if she had been their entire property, independent of the master or owners, and the freight also had been paid in the stipulated manner; and the goods in question were put on board by the vendors under the express orders of the bankrupts, to whom they were delivered for the purpose of being *by them* consigned to their correspondents abroad. Whereas here, and in the case of chartered ships in general, the ship is under the control of the captain appointed by the owner, and the captain acts as a middle man between his owner and the freighter; having a lien upon the goods for his freight, and answerable to the owner for his conduct, and for the most part engaged only to perform a stipulated service, and not bound to obey the commands of the charterer generally. And further, the goods were in this case stopped in their transit to the vendees. The case of *Fowler v. M'Taggart* can only be supported upon this distinction being otherwise contrary to the general class of cases upon this head, and particularly to the subsequent one of *Holst v. Pownall* (a), before Lord *Kenyon*, where, after a delivery of goods by the vendor on board a chartered ship, it was ruled that he might reclaim them upon the insolvency of the vendee; and the Court afterwards rejected a motion for a new trial. [It was observed by *Lawrence* J. that no question was made there upon the distinction of its being a *chartered* ship.] In truth a delivery on board a chartered ship is no more than a delivery to a particular carrier, wharfinger, or packer, named by the vendee, which, though sufficient to make the latter responsible in case of a loss, has never been deemed sufficient to divest the vendor's right to stop in transitu. All the cases are collected in that of *Ellis v. Hunt* (b), (particularly *Stokes v. La Riviere*, where the delivery was to the particular agent of the consignee, and *Hunter v. Beal*,) and also in *Hodgson v. Loy* (c), and *Mills v. Ball* (d), in which latter the vendor stopped the goods even after a delivery to a wharfinger, who received them and paid the freight and charges on account of the vendee. In all these cases the delivery was to the avowed agent of the vendee, yet being for the

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(a) 1 *Esp. Cas. at Ni. Pri.* 242.(b) 3 *Term Rep.* 464.(c) 7 *Term Rep.* 440.(d) 2 *Bos. & Pull.* 457.

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purpose of carriage to the vendee, the right of stopping in transitu, still continued till the goods came to his actual possession. To say otherwise in this case would be to contend that the *transit* was at an end before it even commenced. There is also a great difference in reason between a constructive and an actual delivery to the vendee; for in the latter case the trader has the ostensible ownership, and thereby gains a general credit: it is therefore just that the general creditors should have the benefit of it. But it is otherwise in the instance of a delivery on board a ship, whether chartered or not: there the goods are still unmixed with the mass of the trader's property, and distinguishable from it; though if he gain a particular credit by means of the bill of lading, the goods shall be pledged to the particular creditor; as in *Lickborow v. Mason (a)*, unless where the holder has notice of the defective title (*b*). Besides, half the freight was, by the terms of the charter-party, to be paid by *Crane* before he was entitled to receive possession of the goods, which was not done: and on that account also he was not entitled to them; as in *Northey v. Field (c)*. At any rate, however, the law of *Russia* is decisive in favour of the consignors in this case, the right of reclaiming the goods by the vendors being given by that law in case of the insolvency of the vendee, without regard to the delivery having been made on board a chartered ship or otherwise. Besides which, the delivery to *Crane* was only to be made conditionally, namely, on giving security, as appears by the letter of the 2d of *November*, and also on payment of half the freight as required by the charter-party; and such conditions not having been complied with, no property attached in the bankrupt.

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Gaskell, contra, after observing that in the former case of *Inglis v. Usherwood (d)* it was conceded that the question depended altogether upon the *Russian* law; and that if the case were not controlled by that law, the delivery being on board a chartered ship, the right of stopping in transitu would no longer exist; contended, that the case of *Fowler v. M'Taggart*, there cited, was directly in point upon the subject; and repeated the same arguments which he had urged in the former case. And, in answer to the arguments now advanced, observed further, that

(a) 2 Term Rep. 63.

(b) *Solomons v. Nissen*, ib. 674.

(c) 2 Esp. Ni. Pri. Caf.

(d) *Ante*, 1 vol. §15.

the length of time for which a ship is chartered cannot vary the case, nor the circumstance of the freight having been paid to the owner, which cannot be known to the world in general. The ground of distinction between a delivery on board a chartered and a general ship is, that in the former case the party has the exclusive possession, and the captain is his sole agent pro tempore; and in the latter the possession till delivery to the vendee is in the carrier, who is a middle man; although for some purposes a delivery even to a general carrier, if named by the vendee, will bind the latter to stand to any loss which may happen while the goods are in transitu. If then the delivery were complete to *Crane* the vendee, no question can arise upon the non-performance of any condition; though it is not stated in the case that half the freight was not paid: and if the delivery were binding according to the terms of the charter-party, no subsequent orders of the consignors imposing any new conditions could avail to alter the contract, unless they can establish their right to stop in transitu. The case of *Holst v. Pownall*, which was only at nisi prius, was decided before *Fowler v. McTaggart* was first brought forward to general notice in the argument of *Hodgson v. Loy* (a), and before the distinction as to chartered ships was publicly discussed. And there is no instance in the books of the right to stop in transitu being sustained after a complete delivery to the particular agent of the vendee. In *Hunter v. Beale* (b) the goods were still in the hands of the innkeeper, who was a middle man, when they were sent down to the quay, though by the orders of the vendee. In *Stokes v. La Riviere* (c) the goods were stopped in the hands of a general carrier, though named by the consignee; who might therefore be considered as the agent of both parties for that purpose. And the case of the packer stands on the same foot. All these cases were fully considered in *Ellis v. Hunt* (d), where it was settled that the goods having once come to the virtual possession of the vendee, or those who stood in his place, as, in that case, by putting a mark on them, though they still remained at the inn where they were

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(a) 7 Term Rep. 442.

(b) Sittings after Trinity term 1785, at Guildhall, cor. Lord Mansfield, cited in 3 Term Rep. 466.

(c) 3 Term Rep. 466. (d) 3 Term Rep. 464.

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lodged by the carrier, and therefore the transitus was not ended in fact, yet the vendor could not reclaim them. Now here the only transitus was from the warehouse of the plaintiffs on board the chartered ship, where they were delivered as into the floating warehouse of the vendee; since which the goods have always remained in the same hands: and if the captain did wrong in delivering them to him or his assignees he may be answerable to the plaintiffs, but the property of the assignees in the goods could not be devested, at least without an actual stopping of them while in transitu. He then proceeded to comment on the *Russian* law, and argued that it made no difference in this case, not having been pursued according to the terms of it; and that the certificate of the opinion of the custom-house judges could not be received in evidence, being no more than a mere report of their opinion, and a parol exposition of a written law, and that too extra-judicial. But it is unnecessary to state this part of the argument further, as the Court gave no opinion upon it.

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Marryat in reply distinguished this from the case of *Fowler v. M'Taggart*, where the party was in the exclusive possession of the ship and without controul: the captain and crew were appointed by and responsible to him alone. Whereas here *Cran* had only a qualified ownership, limited as to place, time, and use of the vessel. Half the freight was to be paid for before delivery of the goods, and bills at three months given for the other half; which shews that the captain was at least a middleman, if not the avowed agent of the owner: he had a lien for the price of the carriage like any common carrier. Here then was another right intervening between the consignor and consignee, which shews that the delivery to the consignee was incomplete. He also answered the objections urged against the application of the *Russian* law to the facts of the case.

Cur. adv. vult.

LAWRENCE J. now delivered the judgment of the Court (a).

(a) This included only the opinion of *Gro*se and *Le Blanc* Justices, and his own; Lord *Ellenborough* C. J. having been concerned as counsel in the cause when at the bar. Mr. Justice *Gro*se was prevented by indisposition from attending in court this day; which occasioned the opinion to be delivered by Mr. Justice *Lawrence*.

This

This is an action of trover, brought by the plaintiffs, merchants at *Peterburgh* in *Russia*, against the defendants, who are the assignees of *Crane* a bankrupt, to recover the value of 100 casks of tallow. The cause was tried at *Guildhall* at the Sittings after last *Hilary* term, when a verdict was found for the plaintiffs for 220*l.* damages, subject to the opinion of the Court upon a case, which it will not be necessary to read, as it does not differ from that of *Inglis v. Usherwood*, 1 *East*, 515., as to those facts on which we have formed our judgment: it will therefore be sufficient in the course of what I shall say to state generally the circumstances, on the ground of which our opinion is founded. Two questions have been made for the opinion of the Court. The first is, Whether the opinion of the judges of the custom-house court be admissible in evidence? The second is, Whether the plaintiffs be entitled to recover? In the view we have of the subject, it is not necessary to say any thing on the first question, as to the admissibility of the evidence, except to state that upon that question we form no opinion. The last question will turn upon this point, Whether the goods, which are the subject of this action, were stopped (or, what is tantamount to it, demanded by any one authorised by the consignors to receive them from the persons in whose possession they were) while in transitu: for it shall never be permitted to a carrier by not delivering the goods to vary the property, and decide to whom they shall belong.

The circumstances of the case as applicable to this point are shortly these: *Crane* the bankrupt, a merchant in *London*, entered into an agreement with *Usherwood*, the master of a ship, for that ship going to *Peterburgh*, and there receiving from the factors of the bankrupt a quantity of merchandise of various descriptions, and proceeding from thence to *London*, in consideration of certain freight to be paid per ton, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and *Crane* was fully to load the ship. In consequence of this agreement the ship sailed to *Peterburgh*, and was loaded by *Bohtlingk* and Co. on the account and risk of *Crane*; and one part of the bill of lading directing the goods to be delivered to *Crane* or his assigns was sent to him; the other part, in consequence of the plaintiff's having

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information of *Crane's* insolvency, was afterwards sent to Mr. *Schneider* their agent, with directions not to * deliver that part to *Crane*, unless he gave sufficient security for the amount of the goods. And the plaintiffs at the same time that they sent this part of the bill of lading to *Schneider*, informed *Crane* of their having so done, and required him in case he did not give the security to deliver to *Schneider* the bill of lading that had been sent to him, *Crane*. In fact *Crane* had become a bankrupt before the goods were delivered on board the ship in *Russia*, but after their purchase; and on the arrival of the ship in the *Thames*, *Schneider* demanded the goods of the master, who refused to deliver them to him, and delivered them to the defendants.

For the benefit of trade a rule has been introduced into the common law, enabling the consignor in case of the insolvency of the consignee to stop the goods consigned before they come into the possession of the consignee; which possession Mr. Justice *Buller*, in *Ellis v. Hunt*, says means an actual possession. That the possession of a carrier is not such a possession has been repeatedly determined; and the question now is, Whether the possession of the master be any thing more than the possession of a carrier, and not the actual possession of the bankrupt? And to this, it appears that *Ulberwood* the master contracted with the bankrupt to proceed from hence to *Petersburgh*, and to bring in his ship a cargo of goods, which *Crane* engaged should amount to the tonnage of the ship; which does not differ from a similar contract entered into by the consignor by the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee: in which case it would hardly be contended that a delivery by the consignor to the master of the ship for the purpose of carriage would be such a delivery to the vendee as to prevent the right of stoppage in transitu. In each case the freight would be to be paid by the consignee: in each case the ship would be hired by him: and there would be no difference, except that in this case the ship in consequence of the agreement goes from *England* to fetch the cargo; in the other case the vessel would bring it immediately from the loading port: both in the one case and in the other the contract is with the master for the carriage of goods from one place to another; and until the

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the arrival of the goods at their port of destination and delivery to the consignee, *they are in their passage or transit from the consignor to the consignee*. If a man contract with the owner of a general ship to take goods, which are equal to half the tonnage of the ship, and the master complete the loading of his ship with the goods of others, there would be no question but that there might be such stoppage: and surely it will not be said that the right of stoppage depends on the quantity of the goods consigned. In support of the defendant's claim the case of *Fowler v. M^cTaggart* has been relied on. The more proper name of that case is *Fowler v. Kymer & al.*, which was tried before Mr. Justice Grose at *Bristol*: but that case is very distinguishable from this. There the bankrupts *Hunter and Co.* were in possession of a ship let to them for a term of three years, at 52*l.* 10*s.* per month, they finding stock and provisions for the ship, and paying the master; during which time they were to have the entire disposition of the ship and the complete control over her. The ship had been one voyage to *Alexandria*, and had the goods put on board of her, to carry them on another voyage to the place; not for the purpose of conveying them from the plaintiffs to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. There the delivery was complete; and the facts of that case differ widely from this, where *Crane* had no control over the ship, and had merely contracted with the master to employ his ship in fetching goods for him.

The case of *Stokes v. La Riviere and Lawley* is much stronger than this. The plaintiff being a ribbon weaver, Messrs. *Duhem* of *Lisle* who had just arrived in *London* applied to him for a quantity of ribbons, who on a favourable account by the defendants of their circumstances packed up goods to the amount of 186*l.* 8*s.* 9*d.*, and delivered them to the defendants to be forwarded to *Lisle*. These goods, with others purchased in like manner of *Twigge, Ellis, and Edwards*, gauze weavers, to the amount of 65*ol.*, were forwarded on or about the 12th of *May* to Messrs. *Bine and Overman*, the defendants' correspondents at *Ostend*, with directions to send them to the order of Messrs. *Duhem*. On the receipt of which goods, viz. on the 29th of *May*, *Bine and Overman* wrote to *Duhem* an acknowledgment,

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and that they waited their directions On the 12th of *June* the *Dubems* stopped payment; and by an instrument signed the 13th of *August* consented to *Twigge's* taking back his gauzes, amounting to 41*yl.* 18*s.* 2*d.* But not having fulfilled some engagement with the defendants, and being considerably indebted to them, the defendants countermanded the orders they had given to *Bine, Overman, and Co.*, as to the delivery of the goods, by letter of the 31st of *May*, and directed them to alter the marks, and to deliver them to their order; which was accordingly done, and they were afterwards disposed of in satisfaction of the defendants' demand. They contending, that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. *Dubem*, and that they the defendants had a right to retain them. This cause was tried at *Guildhall* on *Saturday* the 18th of *December* 1784, when Lord *Mansfield* said; "the fact I take to be this: The *Dubems* bought goods of the plaintiff, which were ordered to be delivered to the defendants to be shipped to *Dubems*, who are since become insolvent, after the goods were sent to a factor at *Ostend*. The defendants who have got them back again stand as they originally did. No point is more clear than that if goods are sold, and the price not paid, the seller may stop them in transitu; I mean in every sort of passage to the hands of the buyers. There have been a hundred cases of this sort. Ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu the seller has that proprietary lien. The goods are in the hands of the defendants to be conveyed: the owner may get them back again."

The case of *Inglis and Usherwood* is perfectly consistent with the opinion we have formed. That case did not decide, as was supposed in the argument, that the transit was complete on the delivery of the goods on board this ship; for it was determined on the ground, that the *Russian* laws authorised the taking of the goods, even if the delivery had been complete. In that case Lord *Kenyon* says; "giving the plaintiff the full benefit of the argument, that the delivery of the goods on board a chartered ship was a delivery to the bankrupt, still the *Russian* ordinance takes it out of the rule." Mr. Justice *Grose* uses more general expressions, from whence it may be inferred, that he considered

sidered the ship as one, a delivery on board of which was a delivery to the defendant: but that it was not the true way in which his opinion is to be understood. The case of *Fowler v. Kymer* and *M^cTaggart* had been cited, in reference to which he was speaking: and he is not to be taken as laying down any proposition beyond what was established by that case: and supposing the delivery to be similar to that in *Fowler v. Kymer*, he took the same ground that Lord *Kenyon* did, and decided, that notwithstanding such delivery the goods by the law of *Russia* were in transitu. In the account of what I am stated to have said, I observe that, without naming the case, I recognized the authority of *Fowler v. Kymer* to the extent that case goes; namely, that if one purchase goods here to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee: and I gave it as my opinion, that if the delivery in the case then before us were a delivery, which in this country would have been a delivery to the vendee; still, according to the laws of *Russia*, the goods might be stopped. And my brother *Le Blanc*'s opinion goes entirely on the laws of *Russia*; without inquiring how far the case then before the Court was distinguishable from those cited in any other respect. For these reasons I am of opinion that the *postea* should be delivered to the plaintiffs; in which opinion my brothers *Grose* and *Le Blanc* concur. In the view we have of the subject it is not necessary to say any thing on the other point, as to the admissibility in evidence of the opinion of the Judges of the *Russian* custom-house; with respect to which we form no opinion.

Postea to the Plaintiffs.

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Friday,
Feb. 11th.THURTELL *against* the Inhabitants of the Hundred of MURFORD and LOTHINGLAND, in the County of SUFFOLK.

In an action against the hundred on the stat. 9 Geo. 1. c. 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condition that the party grieved should within the time limited give in his examination upon oath before a magistrate whether or not he knew the offender or offenders, or any of them; and an examination on oath in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, is not sufficient within the statute; still less in support

of an averment in the declaration, that he gave in such examination, &c. *in and by which it appeared* that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders if there were several.

THIS was an action upon the statute 9 Geo. 1. c. 22. s. 7. wherein the declaration stated, that whereas *some person or persons to the plaintiff unknown* within a year past, viz. on the 1st of November 1801, at Bradwell within the hundred, &c. with force and arms feloniously set fire to a certain barn there situate, then in the occupation of the plaintiff, and containing eleven lasts of barley of him the plaintiff of the value of 200*l.*, against the peace, &c.; whereby the plaintiff then and there sustained damage to the amount of 200*l.* And that thereupon within two days next after the committing of the said offence, and after such damage to the plaintiff, &c. the plaintiff according to the form of the statute, &c. gave notice of such offence so done and committed to T. C. and J. F., then two of the inhabitants of the town of B. in the said county, being a town near unto the place where such fact was so committed; and that afterwards and within four days after such notice, viz. on the 4th of November 1801, the plaintiff gave in his examination upon oath before the Rev. R. T. clerk, a justice of the peace, &c. then inhabiting near to the said hundred, &c. according to the form and effect of the said statute, *in and by which said examination it appeared that the plaintiff did not know the person or persons who committed the said fact*, or any of them: and that six months or more has elapsed since the committing of the said offence, but that the offender or offenders have not within the said time, &c. been apprehended for or convicted of the said offence. Nevertheless the defendants have not made satisfaction for the said damage, &c. Plea not guilty.

The remedy against the hundred is given by the 7th sect. of the stat. 9 Geo. 1. c. 22. for damage sustained by reason of the setting fire to any house, barn, or outhouse, and other offences therein enumerated: "Provided" (by s. 8.) "that no person

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"shall

" shall be enabled to recover any damages by virtue of this act,
 " unless within two days after such damage done him by any
 " such offender, &c. he shall give notice of such offence
 " unto some of the inhabitants of some town, &c. near the
 " place, &c., and shall within four days after such notice
 " give in his examination upon oath, or the examination upon oath
 " of his servant, &c. who had the care of his house, &c. before
 " any justice of peace of the county, &c. inhabiting within
 " or near to the hundred where the said fact was committed,
 " whether he know the person or persons that committed such fact, or
 " any of them : and if upon such examination it be confessed that
 " he do know the person, &c. that then he so confessing shall be
 " bound by recognizance to prosecute such offender," &c. By s. 9.
 the hundred is not to be liable if the offender be convicted
 within six months after the offence committed : and by s. 10. the
 party grieved must commence his action within a year afterwards.

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 against
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 of
 MUTFORD,
 &c.

At the trial before *Grose J.* at the last assizes the plaintiff,
 together with proof of the other facts alleged in the declaration,
 produced in evidence his written examination taken on oath
 before the magistrate, entitled "*Suffolk*. The examination of
 " *T. Thurtell*, of &c. taken upon oath before me *R. T.* clerk,
 " one of the justices," &c. which, after stating that a certain
 person had, about four o'clock in the morning of *Sunday* last the
 1st of *November*, called at the examinant's dwelling-house in the
 parish of *Bradwell*, and informed him that his barn was on fire,
 which he soon perceived, and that there was in the barn a cer-
 tain quantity of barley; proceeded to state, " that he this ex-
 " aminant immediately went to the said barn, where he found that
 " several people had assembled, but that he had no reason to suspect
 " that any of the persons then present at the said barn had set the same
 " on fire, as they appeared ready to render any assistance towards
 " extinguishing the said fire had there been any water near. And
 " the said examinant further saith, that he strongly suspects that the
 " said barn was wilfully set on fire by some person or persons to him un-
 " known as from the state in which the corn deposited in the barn
 " was got up he does not believe that the fire arose from any
 " natural heat in the said corn, nor does he know or believe that
 " there was a tempest at the time at which the fire took place."

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(Signed by the plaintiff.) The learned Judge was of opinion

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that this examination did not specifically comply with the requisite of the act of parliament, or prove the corresponding averment in the declaration, that the plaintiff had given in his *examination* on oath before a magistrate, *by which it appeared* that the plaintiff *did not know the person or persons who committed the fact, or any of them*: and directed a nonsuit. For setting aside which a rule nisi was obtained in the last term, on the ground that the statute did not require any particular form of taking the examination, which was the act of the magistrate, who put such questions to the party grieved as he thought proper. That it sufficiently answered the purpose of the statute that the party went before the magistrate to submit himself to be examined touching his knowledge of the transaction and the persons concerned in it. That in common parlance the words of the examinant *prima facie* at least imported that he did not know *any of the persons by whom the fact was committed*. And that if the magistrate had any doubt whether the party had such knowledge, he should have made it more clear by putting further questions to him.

GROSE J., at the time of granting the rule nisi, observed, that it was important that the examination should pursue the words of the act, and distinctly ascertain whether the party did or did not know any of the persons who committed the fact. That this was a condition precedent to the maintaining the action, and was one of the checks provided by the legislature to avoid imposition in these cases, which was very necessary to be preserved. But that he had reserved the point for the consideration of the Court, it being a matter of great importance to the public.

Sellon Serjt. and Alderson shewed cause and contended, first, that the proof did not sustain the positive averment in the declaration, that *it appeared in and by the said examination that the plaintiff did not know the person or persons who committed the fact*; for the examination itself only states his *suspicion* that it was done wilfully by some person or persons to him unknown, for the reasons stated by him. Secondly, that the statute made it a condition precedent to the party's right to sue the hundred that he should depose affirmatively or negatively to his knowledge of the offender; and they referred to *King v. The Inhabitants of*

the Hundred of Bishop's Sutton in Hants (a); where that was holden to be a condition precedent for the sake of the * hundred and to prevent screening the offenders: and the party there swearing only to his suspicion and not to his knowledge was deemed insufficient.

Wilson in support of the rule. As to the construction of the statute, this branch of it is remedial, and ought to have a liberal construction in advancement of the remedy. The terms used are merely directory to the magistrate by whom the examination is to be taken, to enable him to act, and set the law in motion to discover the offenders. The examination itself, whether taken with more or less accuracy, is the act of the magistrate, and if he be satisfied of the truth of the facts required by the statute, it is complied with, and there is an end of the inquiry: if not satisfied with it, he may examine further. The taking the examination is an act to be done very recently after the fact; and generally without the means of obtaining legal advice; to require a critical observance of the words of the statute will therefore frequently defeat the object of the legislature, who could not have meant that if the magistrate were too easily perhaps satisfied of the requisite facts, that should oust the party grieved of his remedy. [*Lawrence J.* The statute requires the party to *give in* his examination upon oath, which seems to imply that it is to be the act of the party himself, swearing to an affidavit of the facts, rather than the act of the magistrate taking such examination in writing from the mouth of the party in answer to questions put by him.] The statute only meant that the party should tender himself for examination to the magistrate, who is to examine him on behalf of the hundred, whether or not he know the offender; and therefore the examination is to be made by a magistrate within or near the hundred: it could not mean that the party should give in on oath a written paper of the facts previously prepared by him; otherwise the magistrate would be precluded from further examination. The very word *examination* decides this; for there can be no examination without an examiner and an examinee. Then as to the averment in the declaration, it is true that it goes farther than it need have done, and states that it appeared by the ex-

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(a) 2 Stra. 1247.

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amination that the plaintiff *did not know* the offender or offenders by whom the fact was committed; but that is the general drift and import of the examination, and therefore fair evidence of the averment, supposing it necessary to be proved.

LORD ELLENBOROUGH C. J. The words of the statute requiring the party to *give in his examination* upon oath, &c. as to the fact of his knowledge of the offenders, must be understood to mean that he should give in a written declaration on oath as to the fact; though that is not a correct use of the word *examination*, however it may be sometimes so used in common parlance. This, however, does not preclude the magistrate from any further examination which he may think proper to take. But at all events it was intended that such a declaration should be given in on oath to the magistrate in order to found the further proceedings upon it. The law may be remedial as to the party grieved, but it gives the remedy against the hundred, who would not otherwise have been liable in damages to him, and must therefore be strictly pursued. And it is plain from the subsequent provisions that the legislature viewed the remedy with some degree of jealousy, and interposed certain precautions to prevent the abuse of it, which must be complied with in order to entitle the plaintiff to his action. But I do not think that the examination read is sufficient either within the words or spirit of the act. He swears, it is true, to his suspicion that the barn was wilfully set on fire *by some person or persons to him unknown*. Now supposing the barn to have been set on fire by five persons, some of whom he might know, but he did not know them all, could perjury be assigned upon this swearing? It might be said to be truly sworn in the terms of it. And consistently with this examination the plaintiff might even have procured persons whom he did not know to commit the offence.

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LAWRENCE J. (a). One great object of the legislature in the provision of the statute in question was to make it the interest of every person to find out the offenders in order that they might be prosecuted. For this purpose it stipulates that certain things shall be done by the party grieved to entitle himself to his remedy against the hundred, which he is bound to perform.

(a) *Grose J.* was absent on this day from indisposition.

It

It is true that requiring a strict performance of these may throw difficulties in the way of the action: but if on the other hand an affidavit might be made before a magistrate, upon which the party could not be indicted for perjury, though he had knowledge of some of the offenders, which he did not disclose, and yet he might maintain his action, the whole object of the statute would be defeated.

LE BLANC J. The statute at all events meant that the party should go before a magistrate, and be examined whether he *know* or do not know *the person or persons that committed the fact, or any of them*. And if the magistrate do not examine him as to that fact, he does not swear to it; he does not bring himself within the act so as to be entitled to his remedy against the hundred. And I think that the declaration must state as to what he was examined.

Rule discharged.

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GLASSINGTON and Others, Assignees of DICKEY, a Bankrupt, against RAWLINS and Others.

Friday,
Feb. 11th.

IN trespass for taking and carrying away certain goods of the plaintiffs' which had been the property of the bankrupt, the only question was, Whether the act of bankruptcy, which consisted in lying in prison two months upon an arrest for debt, were complete at the time of issuing the commission? As to which, it appeared that the bankrupt was arrested for debt on the 14th of October 1800, and lay in gaol beyond the 9th of December following, on which day the commission issued, which if either the day of arrest or the day of the commission issued were to be reckoned inclusively, made up 56 days or two lunar months, the time required by the statute 21 Jac. 1. c. 19. s. 2. according to the common legal computation of months. The plaintiffs however were nonsuited at the trial before Lawrence J. at the Sittings at Westminster after the last term, upon a supposition

Where time is to be computed from an act done, the day on which such act is done is to be included in the computation. Therefore where the stat. 21 Jac. 1. c. 19 s. 2. enacts that a trader lying in prison two months (i.e. lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest.

sition

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sition that the bankrupt had not lain in prison two complete months when the commission issued.

Garrow and *Park* shewed cause against a rule obtained for setting aside the nonsuit. The words of the statute are, that every person using trade, &c. who "being arrested for debt" shall *after* his arrest lie in prison two months, &c. shall be "adjudged a bankrupt: and in the said cases of arrest or lying" in prison for such debt *from* the time of his said first arrest:" which words *after* and *from* must be construed to be exclusive of the day of arrest as well as the day of suing out the commission, according to their natural signification, and because there is no fraction of a day in law. The system of the bankrupt laws supposes that the bankrupt is a criminal, and therefore the several provisions which declare him to be in that state must be construed strictly. Besides, the very ground and reason of declaring the act of bankruptcy in question, which has relation back to the time of the arrest, is from the presumed insolvency of the person at the time, who upon an arrest has not credit enough to procure bail for 56 days; but that cannot be said unless he has that entire number of days to redeem himself. The arrest may take place so late on the first day that it may preclude any endeavour to find bail then. And in *Gordon v. Wilkinson* (a) Lord *Kenyon* said he could not conceive how a commission of bankrupt could be taken out in such a case before the two months were *expired*: and afterwards he observed, that the act of bankruptcy itself was not completed till the *expiration* of the two months.

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LAWRENCE J. The nonsuit proceeded on the supposition that the bankrupt had not lain two months in prison before the commission was issued: but upon calculating the number of days with reference to the rule of law which has been established for computing time from any act done, it appears that we were mistaken at the trial. The question is, Whether the day of the arrest is to be included in the computation? And I am of opinion that it must be so included, upon the authority

(a) 8 Term Rep. 507.

of *The King v. Adderley* (a), where the rule was laid down generally, that where the computation of time is to be made *from an act done*, the day when such act is done is to be included. Now here the computation of the two months is to be from an act done, namely, from the arrest of the trader, and therefore the day on which the arrest is made is to be included in the reckoning.

Per Curiam (b),

Rule absolute.

Erskine was to have supported the rule.

(a) *Doug* 463. and vide *Ca'le v. Burditt*, 3 *Term Rep.* 623 S. P.

(b) *Grosc* J. was absent from indisposition.

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SARELL, Administrator, &c. against WINE.

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ASSUMPSIT upon the money counts, in all of which the promises were laid to be made to the intestate; to which non assumpsit and the statute of limitations were pleaded. At the trial before Lord *Ellenborough* C. J. at the Sittings after last term at *Guildhall*, the only evidence given was of an acknowledgment by the defendant, since the death of the intestate, and within six years, of an old existing debt due to the intestate more than six years ago. Thereupon a verdict was taken for the plaintiff, with leave to the defendant to move to set it aside and enter a nonsuit; which was accordingly moved for on a former day by

Gibbs, who observed, that though an implied promise to pay might be raised from an acknowledgment of the debt, yet it must be raised to a person living at the time * when the acknowledgment was made, and could not refer back by relation to a period before the intestate's death: and if not, then the evidence could not apply to any of the counts of the declaration.

Lord *ELLENBOROUGH* C. J. on this day, when cause was to have been shewn, said, that the case of *Green* (or *Dean*) v. *Crane*, reported in 2 *Ld. Raym.* 1101. 6 *Mod.* 306. and 1 *Salk.* 28. was decisive in support of the objection, and that a nonsuit must be entered.

Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate.

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Park

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Park for the plaintiff admitted that that case was in point against him, if the Court thought that it had been properly ruled.

Per Curiam,

Rule absolute.

Saturday,
Feb. 12th.

M. T. HAWKINS, Widow, JOHN and JAMES BRADSHAW, and
C. BUTLER against KEMP.

were

Where in a marriage settlement made by tenant in tail, he settled the same to himself for life and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing attested by three witnesses, and to be inrolled with the consent in writing of certain trustees, to revoke the old and declare new uses. Held that a deed

IN assumpsit the plaintiffs declared, that whereas they seized in fee of certain premises in the parishes of *Chilham, Sellinge, and Boughton, &c.* in the county of *Kent*, and were about to sell part of the same by auction, under certain printed conditions of sale, (therein set forth) amongst others, that the purchaser should immediately pay a deposit of 20*l.* per cent. on the purchase money, and * the remainder before the 31st of *October* 1801, on having a good title made to him, &c. and prepare a conveyance, &c. the defendant promised in case he became the purchaser to perform the said conditions, &c.; they then averred that a sale was made on the 3d of *July* 1801, at which the defendant became the purchaser of certain lots, according to the printed particulars, for the sum of 700*5*l.**, and paid a deposit of 1400*l.* for the use of the vendors in part payment: and although the plaintiffs performed all the conditions of sale which as vendors they ought to have done, and were ready to make a good title to the premises purchased by the defendant, and to convey the same according to the conditions of sale, &c.; yet the defendant refused to prepare any conveyance of the same, &c. (as required by the conditions of sale,) and refused to pay the remainder of the purchase-money, &c. To this the defendant pleaded non assumpsit.

of revocation executed by him and all the trustees in person except one, and the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustee, is bad, though properly attested and inrolled: and that another deed of revocation properly executed and assented to, but not inrolled till after the settlor's death, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the lifetime of the person by whom it is to be executed: and also held that the defect of the one deed could not be supplied by the other. [*114]

The

The cause was tried at the last Sittings in *Easter* term before Lord *Ellenborough* C. J., when a verdict was found for the plaintiffs, damages 560*l.*, subject to the opinion of the Court upon the following case.

The premises in question were put up to sale by auction, as stated in the declaration, on the 3d of *July* 1801, under the conditions and according to the particulars therein stated. The defendant became the purchaser of the lots in question at the said sale for 700*l.* and paid the plaintiff 1400*l.* as a deposit, and in part payment of the purchase-money for those lots. The plaintiffs delivered in due time an abstract of title comprising the after-mentioned deeds and assurances, as and for a good title to the said lots, and offered to execute a conveyance thereof to the defendant, and in all other respects complied with the several conditions of sale. The defendants refused to complete the purchase; objecting first that the title comprised in the abstract was not a good title; and secondly, that no valid conveyance could be executed by the plaintiffs alone without the execution of *James Bradburst*, one of the devisees in trust named in the will of *Thomas Hawkins* hereinafter mentioned, or the appointment of a new trustee in his place, notwithstanding the deed of renunciation dated 20th of *April* 1801 hereinafter set forth. The defendant has refused to complete his purchase.

By an indenture of bargain and sale, dated the 12th of *May* 1770, inrolled in the Court of Common Pleas, *Easter* term, 10 *Geo.* 3. and made between *John Hawkins* and *Susannah* his wife, who were seised of the premises therein and hereinafter mentioned for their lives, and their eldest son and heir apparent *Thomas Hawkins*, who was seised thereof in tail of the first part; *John Bradshaw* and *Mary Bradshaw* spinster of the second part; *William Wilby* of the third part; *E. T. H. Gower* and *N. Tuitt* of the fourth part; and *R. Tuitt*, *James Bradshaw*, *H. Darell*, and *E. Pitts* of the fifth part; it is witnessed, that for the reasons therein mentioned, and for barring all estates tail and all remainders and reversions expectant thereon of and in the manor, lands, and hereditaments hereinafter mentioned, and also in consideration of 10*s.* &c. *John Hawkins*, *Susannah* his wife, and *Thomas Hawkins*, did grant, bargain and sell to *W. Welsby*, his heirs, &c. the premises in question, among divers
lands

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lands in the county of *Kent*, and the reversion and remainder, &c. and all the estate, &c.; habendum to the use of the said *W. Welby*, his heirs, &c. to the intent that he might become tenant of the freehold for suffering a common recovery of the same, in which *E. T. H. Gower* and *N. Tuite* should be demandants, *W. Welby* tenant, *John Hawkins* and *Susannah* his wife first vouches, and *Thomas Hawkins* second vouches: declaration, that the recovery should enure until the intended marriage to the then uses, and after the marriage to the use and intent that *John Hawkins* and *Susannah* his wife might during their joint lives and the life of the survivor receive such annuity as therein mentioned: remainder to the use of the said *R. Tuite*, *J. Bradshaw*, *H. Darell*, and *E. Pitts*, for the term of 500 years from the intended marriage, sans waste, for securing the several sums of money therein mentioned: and after the expiration or sooner determination of the same term, and in the mean time subject thereto and chargeable as aforesaid, to the use of *Thomas Hawkins* and his assigns for life, sans waste: remainder to the use of the said *E. T. H. Gower* and *N. Tuite*, &c. to preserve the contingent remainders, remainder to the use, intent, and purpose, that *Mary Bradshaw* and her assigns might after the decease of *Thomas Hawkins* receive thereout for her life a yearly rent-charge; and subject thereto to the use of the first and every other son and sons of the body of the said *Thomas Hawkins* on the body of the said *Mary Bradshaw* to be begotten severally and successively in tail male: remainder to the use of the first and other sons of the said *Thomas Hawkins* by any after-taken wife successively in tail male: remainder to the use of *Henry Hawkins*, third son of the said *John Hawkins*, for life, sans waste: remainder to the use of *E. T. H. G.* and *N. T.* &c. to preserve contingent remainders: remainder to the use of the first and other sons of the said *Henry Hawkins* successively in tail male: remainder to the use of the said *John Hawkins* for life, sans waste, remainder to the use of the said *E. T. H. G.* and *N. T.* &c. to preserve contingent remainders: remainder to the use of the first and every other son of the said *John Hawkins* by any after-taken wife successively in tail male: remainder to the use of all and every the daughter and daughters as well of the said *Thomas Hawkins* as of the said *Henry Hawkins*

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Hawkins, in equal shares as tenants in common in tail, with cross remainders in tail between them, if more than one; and if all such daughters except one should die without issue, or there should be but one such daughter, then to the use of such surviving or only daughter in tail: remainder to the use of the right heirs of the said *John Hawkins* for ever. And among other provisoes is contained the following "*Proviso*, that it should be lawful for the said *Thomas Hawkins*, at any time or times thereafter, by any deed or deeds, instrument or instruments in writing, to be duly executed by him in the presence of and attested by three or more credible witnesses, and to be enrolled in one of his majesty's courts of record at Westminster, by and with the consent and approbation in writing of the said *Mary Bradshaw*, *John Hawkins*, *John Bradshaw*, *E. T. H. Gower*, *N. Tuite*, *R. Tuite*, *James Bradshaw*, *H. Darell*, and *E. Pitts*, or the survivors or survivor of them, or the executors or administrators of such survivor, but not otherwise, to revoke, make void, alter, or change, all and every or any of the uses, estates, trusts, powers, provisoes, limitations, declarations, and agreements respectively thereinbefore mentioned of or concerning all or any of the said thereby bargained and sold premises; and by the same or any other deed or deeds, instrument or instruments in writing, so executed and attested, and with such consent, and so to be enrolled respectively as aforesaid, and not otherwise, any new or other use or uses, estate or estates, trust or trusts, of or concerning all or any of the said premises whereto any such revocation as aforesaid should extend, to declare, limit, or appoint, with or without power of revocation and new appointment, or otherwise howsoever, as to the said *Thomas Hawkins* with such consent and approbation as aforesaid should seem meet; any thing thereinbefore contained to the contrary notwithstanding. This was executed by the said *John Hawkins*, *Sus. Hawkins*, *Thomas Hawkins*, *John Bradshaw*, *Mary Bradshaw*, *William Welby*, *E. T. H. Gower*, *N. Tuite*, *R. Tuite*, *Jas. Bradshaw*, *H. Darell*, and *E. Pitts*, in the presence of two witnesses, and a receipt by *T. Hawkins* for the sum of 10,000*l.* indorsed thereon. In *Easter* term 10 *Geo.* 3. a recovery was duly suffered in pursuance of the before-mentioned deed. By deed-poll or letter of attorney, dated 14th of *April* 1790, under the hand and seal

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torney.

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*First deed of
 revocation and
 new appoint-
 ment.*

of the said *Robert Tuite*, theretofore of the parish of *Saint Mary le-Bone* in the county of *Middlesex*, but then of the island of *Santa Cruz*, reciting the hereinbefore abstracted indenture of bargain and sale of the 12th of *May* 1770, and the said common recovery suffered thereof, and the hereinbefore abstracted power of revocation and new appointment contained in the same, *Robert Tuite* did by the now abstracting deed-poll nominate and appoint *Thomas Hawkins* his lawful attorney, for him and in his name in writing, to consent to and approve of his (*Thomas Hawkins*) revoking, &c. or changing all and every or any of the uses, estates, and trusts, &c. respectively in the said therein recited indenture mentioned, concerning all the premises thereby bargained and sold; and also to consent to and approve of his the said *Thomas Hawkins* limiting any new or other uses, estates, or trusts, of or concerning the same, with or without power of revocation and new appointment, or otherwise howsoever, as to the said *Thomas Hawkins* should seem meet: and likewise for him (*R. Tuite*) and in his name to execute any deed or instrument in writing, necessary for declaring his the said *Robert Tuite's* consent and approbation in writing to or of any such revocation, new limitation, or appointment to be made by the said *Thomas Hawkins*: and generally to execute any other act, deed, matter or thing whatsoever, for effectuating the intent aforesaid, as fully and absolutely as *R. Tuite* himself might do.

This was executed by *R. Tuite* in the presence of two witnesses. By a deed-poll, dated the 17th of *July* 1791, inrolled in the Common Pleas in the life time of *Thomas Hawkins*, and indorsed upon the said hereinbefore abstracted indenture of the 12th of *May* 1770, and executed by *Thomas Hawkins*, and also by the said *Thomas Hawkins* as the attorney of *R. Tuite*, and inrolled in the court of Common Pleas of *Trinity* term 31 *Geo. 3.* reciting that soon after the date and execution of the last-mentioned indenture the marriage between *Thomas Hawkins* and *Mary* his wife was solemnized, and that *John Hawkins*, *John Bradshaw*, *E. T. H. Gower*, *N. Tuite*, *James Bradshaw*, and *E. Pitts*, were dead, and that *Thomas Hawkins* was desirous and had agreed, with the consent and approbation of *Mary Hawkins*, *R. Tuite*, and *H. Darell*, to execute in manner thereafter mentioned the powers of revocation and new limitation granted,

granted, limited, and reserved to him by the said indenture of bargain and sale of the 12th of *May 1770*: it was by the now abstracting deed poll made known that by force and virtue of the power and authority in the said last-mentioned indenture for that purpose contained, and of all and every the powers and authority enabling him in that behalf, and in exercise and execution thereof, and in part of performance of the agreement aforesaid, he *Thomas Hawkins*, with the consent and approbation in writing of the said *Mary Hawkins*, *R. Tuite*, and *H. Darell*, testified by their severally executing the same, did by that deed or instrument in writing, duly executed by him in the presence of and attested by three credible witnesses, and to be inrolled in his majesty's court of Common Pleas at *Westminster*, *revoke and make void all and every the uses, estates, trusts, powers, provisoes, limitations, declarations, and agreements*, respectively in the said indenture of bargain and sale mentioned, concerning all the manor, lands, &c. and premises in the county of *Kent*, in that indenture mentioned and described, bargained and sold; and he the said *Thomas Hawkins*, with such consent and approbation, and so to be inrolled respectively as aforesaid, did thereby limit and appoint all and singular the said messuages, lands, &c. and premises, and the reversion, &c. to the use of such person and persons, for such estate and estates, upon such trusts, and for such intents and purposes, as he at any time during his life, by any deed or instrument, &c. with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will, or any codicil, to be signed and published by him in the presence of and attested by three or more credible witnesses, should limit; direct, or appoint; and in default of such direction, limitation, or appointment, and in the mean time and until such limitation, direction, or appointment should be made, and also subject to any such limitation, direction, or appointment, where the same should happen not to be a complete and entire appointment of the whole estate and interest in the said premises, to the use of him the said *Thomas Hawkins* in fee. And the said *Thomas Hawkins* did thereby also declare that the said common recovery since perfected, and all other assurances of the said manor and premises, should enure, and that the recoveror named and his

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heirs should stand and be seised of the said manor, &c. and premises, to the uses, upon the trusts, and for the intents and purposes hereinbefore declared. This was executed by *Thomas Hawkins, Mary Hawkins*, and by *R. Tuite*, by the said *Thomas Hawkins*, his attorney, and *H. Darell*, in the presence of three witnesses, the said *Mary Hawkins, Robert Tuite*, and *Henry Darell*, being the then only surviving trustees named in the deed of the 12th of *May 1770*. By an indenture, dated the 4th of *December 1798*, between *Thomas Hawkins* of the first part, *Mary Hawkins* his wife of the second part, and *H. Darell* and *Robert Tuite* of the third part; reciting the said indenture of bargain and sale of the 12th of *May 1770*, and the recovery suffered in pursuance thereof, and also the said first abstracted deed-poll, and also the said lastly hereinbefore abstracted deed-poll of the 17th of *July 1791*; and also reciting that the said deed-poll of the 17th of *July 1791* was executed by the said *Robert Tuite* to the said *Thomas Hawkins* as his attorney, in pursuance of or under a certain deed-poll, dated the 14th of *April 1790*; and that upon that account doubts had been entertained, whether the deed-poll of the 17th of *July 1791* was a valid execution of the power of revocation by the indenture of the 12th of *May 1770*, reserved to *Thomas Hawkins* as before mentioned; it was therefore for obviating all such doubts by the said now abstracting indenture witnessed that by force and virtue and in execution of the power or authority to *Thomas Hawkins* for that purpose reserved by the indenture of bargain and sale, and of every other power and authority enabling him in that behalf, he *Thomas Hawkins*, with the consent and approbation of *Mary* his wife, *H. Darell*, and *R. Tuite*, testified by their severally being parties to and executing the same, did by the now abstracting deed, duly executed by him in the presence of and attested by the three credible persons, whose names were intended to be thereupon indorsed as witnesses attesting the due execution thereof by him the said *Thomas Hawkins*, and intended to be inrolled in one of his majesty's courts of record, revoke all and every the uses, estates, trusts, &c. in the said in-part-recited indenture expressed and contained, of and concerning all the messuages, lands, &c. and other the thereby bargained and sold premises: and he the said *Thomas Hawkins*, with the like consent, &c. did thereby declare, limit, and appoint that the

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said manor, lands, &c. and premises should thenceforth be and continue, and the recovery so suffered, and all other assurances, &c. in the law, should operate and enure to the use of such person and persons, and for such estate and estates, upon such trusts, and for such intents and purposes, as he the said *Thomas Hawkins* at any time during his life, by any deed, &c. with or without power of revocation, to be executed by him in the presence of and attested by two or more credible witnesses, or by his last will, or any codicil, &c. executed and published in the presence of and attested by three or more witnesses, should limit or appoint; and in default of such limitation or appointment, and in the mean time and until such limitation or appointment should be made, and also subject to any such limitation or appointment when the same should happen not to be complete, &c. to the use of him the said *Thomas Hawkins* in fee. This was executed by *Thomas Hawkins, Mary Hawkins, H. Darell, and R. Tuite*, in the presence of three witnesses; but the execution thereof by *R. Tuite* was some months subsequent to the execution thereof by *Thomas Hawkins*. The case then set out the will of *Thomas Hawkins*, *Will of T. Hawkins.* dated 14th February 1800, properly executed and attested in the presence of three witnesses, whereby after several specific bequests to his wife *Mary Hawkins*, and to his three daughters *Mary, Ann, and Eleanor*, the testator in exercising every power enabling him in that behalf did appoint and devise all the manors, lands, &c. comprised in his marriage settlement, and all other the manors, lands, &c. of which he or any persons in trust for him was or were seised, &c. or of which he had power to dispose by that his will, (except those vested in him upon trust or by way of mortgage,) to the use of his said wife and to *John and James Bradshaw*, three of the plaintiffs, *J. Broadhurst* and *C. Butler* the other plaintiffs, their heirs, &c. upon trust that they or the survivors, &c. should with all convenient speed after his decease sell and dispose of and convey the said manors, &c., and should stand and be possessed of the money arising from the said sale, upon the trusts thereafter mentioned. And that the receipt of the said trustees (naming them), or the survivors or survivor of them, or the executor, &c. of such survivor, for the purchase-money, should be a sufficient security to the purchasers: and the testator appointed his wife and the other trustees last

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named executors of his will and guardians of his children. By a codicil to the said will, dated 14th *February* 1800, and executed by the testator in the presence of three witnesses, he made some alteration in the trusts of the said monies to arise from the sale of his estates; and in all other respects confirmed his said will. *The testator died in September (a) 1800, leaving four daughters, and also leaving his brother John named in the settlement of the 12th of May 1770, him surviving. The indenture of the 4th of December 1798 was not inrolled in the lifetime of the said Thomas Hawkins. On the 16th of October 1800, a fiat for the inrolment thereof was granted by the then Chief Justice of the Court of Common Pleas, and is in the following words: "Let this deed be inrolled in his Majesty's Court of Common Pleas at Westminster; Eldon." Dated the 16th of October 1800. And in pursuance of this fiat the said indenture was inrolled. A memorandum of such inrolment was made and signed by the proper officer of the said court on the back thereof in the following words, viz. "Inrolled in his Majesty's Court of Common Pleas at Westminster of the term of the Holy Trinity in the 40th year of the reign of G. 3." By indenture, dated 20th of April 1801, between the said James Broadhurst of the one part, Mary Hawkins (the widow of Thomas Hawkins), John Bradshaw, James Bradshaw, and C. Butler, of the other part; after reciting the will of Thomas Hawkins and the said devise to the trustees of his real estate, and that the testator bequeathed all his personal estate and effects, not otherwise specifically disposed of, unto his said wife and the other trustees named, &c. upon the trusts, &c. in the said will expressed, and noticing the appointment of his said wife and the said trustees to be his executors and guardians of his children; and also noticing the codicil to his will; and reciting that Thomas Hawkins died in the month of September last; and the said James Broadhurst having declined to act, and being desirous to renounce the executorship and the trusts of the said will, they the said Mary Hawkins, John Bradshaw, James Bradshaw, and Charles Butler, had alone proved the will and codicil of Thomas Hawkins; it was witnessed that the said James Broadhurst, with the privity and upon the acceptance of the said*

(a) It was said at the bar that he died on the 23d of September.

Mary

Mary Hawkins, John Bradshaw, James Bradshaw, and Charles Butler, testified as therein mentioned, did by the now said abstracting indenture absolutely and irrevocably disclaim unto the said • *Mary Hawkins, John Bradshaw, James Bradshaw, and C. Butler*, their heirs, &c. all the real and personal estates, trulls, &c. and authorities whatsoever by the will of *Thomas Hawkins* devised, &c. This was executed by *James Broadhurst*, and duly attested. The said *Mary Hawkins, John Bradshaw, James Bradshaw, and C. Butler*, four of the five trustees named in the said will, are the plaintiffs in this action. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in the said action? and that question was agreed between the parties to depend on the following questions; first, Whether the uses limited by the deed of the 12th of May 1770 have been well revoked by all or any of the subsequent deeds and the will of *Thomas Hawkins*, so as that the devisees named in the said will could make a good title to the purchaser? secondly, Whether it were necessary that the said *James Broadhurst* should join in a conveyance to a purchaser?

Questions.

This case was argued in *Michaelmas* term very elaborately and at great length: but it is sufficient to mention the heads of the argument, as the Court, in giving judgment, went so fully into the consideration of the principal arguments and authorities cited.

Williams Serjt. for the plaintiffs contended, on the first question, that the uses limited by the deed of the 12th of May 1770 had been well revoked by *Thomas Hawkins*, and the powers thereby reserved effectually executed by him. 1st, The deed of the 4th of December 1798 was a valid execution of the power, and therefore a good revocation of the uses. But supposing it otherwise; 2dly, The old uses were well revoked by the deed of the 17th of July 1791. Or, 3dly, At any rate the two deeds taken together amount to a good revocation. 1st, This is one of that class of powers which is always construed liberally and largely. For *Thomas Hawkins*, who was tenant in tail of the premises, subject to his father's life-estate, joined with him in suffering a recovery, by which he acquired the fee simple, subject to such life-estate. For if no uses had been limited by the deed to declare the uses, the estate would have resulted to

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the father for life, remainder in fee to *T. Hawkins*: but, though certain uses were limited in consideration of the intended marriage by the indenture of *May 1770*, yet, except as to the issue, those were merely voluntary, with respect at least to the marriage; such as the limitations to the brothers *Henry* and *John*; as in *Jenkins v. Kemish (a)*. In *Kibbett v. Lee (b)*, recognized in *Lord Darlington v. Pulteney (c)*, uses were holden well revoked by a *will* under a power to revoke by writing under hand and seal, and *delivered*; which last stipulation seemed to point to a revocation by deed, as the *will* could not operate as such till after the party's death. And a distinction was taken in *Sayle v. Freeland (d)* between the execution of powers to incumber a third person's estate, and the party's own: that in the latter case the want of little circumstances required would be helped in equity. The principle to be collected from the cases is, that if the power be substantially executed, the Court will dispense with mere ceremonies performed either at another time or place than required. Here there is no doubt but that the deed of the 4th of *December 1798* was upon the face of it sufficient to revoke the old uses; the only objection is, that it was not inrolled till after *Thomas Hawkins's* death; but that was a mere ceremony, which might be performed at any time, and when performed would have relation to the execution of the deed; but it cannot affect the validity of the deed, which was a complete deed by the sealing and delivery before the inrolment: and therefore not like a recognizance at common law, which had no effect till entered on the roll, not being till then a perfect record: yet even there if the cognizor died after acknowledgment before a judge, the land was bound before the stat. 7 *Eliz. c. 4.* from the time of such acknowledgment, though no actual inrolment made till after his death. *Hall v. Winckfield (e)*, recognized in *Perry v. Bowes (f)*, and *Bothomly v. Lord Fairfax (g)*. The inrolment is not the act of the party but of the Court, and therefore it may be done at any time; and yet if not inrolled the recognizance is void. 2 *Roll. Abr.* 393. Till inrolment indeed the power may be considered as in fieri, and therefore capable of being released

(a) *Hardr* 395.(b) *Hob.* 312.(c) *Comp.* 267.(d) 2 *Ventr.* 350.(e) *Hob.* 195.(f) 1 *Ventr.* 360.(g) 1 *P. Wms.* 334.

or extinguished, according to *Digger's* case (a): but it was not there said to be essential to the execution of the power that the deed should be inrolled during the life of *Digger*, though the act of inrolment be necessary to the completion of the power. So in *Shelley's* case (b), the rule is stated in argument, and afterwards confirmed by the judgment, that the execution of things executory always respects the original act or cause executory; and when the execution is done, it has relation to the thing executory; and all makes but one act or record, though it be performed at several times. And the same was holden by *Croke* and *Montague*, Justices, in *Haverhill v. Hare* (c). Some conveyances at common law require indeed to be perfected in the lifetime of the parties; but those depend upon technical rules of the common law, that the freehold cannot be in abeyance, and consequently cannot be made to commence in futuro, and that no condition can be introduced to defeat the limitation but in favour of the grantor and his heirs. But it is otherwise as to conveyances under the statute of uses, where the freehold may be limited to commence in futuro, either at a definite time or upon a certain event: it may also be defeated, abridged, or postponed in favour of a stranger, by a proviso in the same deed, by a power reserved, or by a springing or shifting use: or a use may descend to the heir, and he may take by descent, although the ancestor were never seised in his lifetime. As in *Shelley's* case, where there was an interruption to the estate by the death of *Edward Shelley* before the recovery was executed, and yet the uses were deemed to be vested in *Richard* his heir by descent. Until the recovery was perfected by execution the estate vested in the heir, but when so perfected after the death of *E. S.* the estate of the heir was defeated. By the same rule, the estate here may be divested by the inrolment, which perfected the execution of the power after the death of *Thomas Hawkins*; for this is the case of a deed to uses, and not a conveyance at common law. At common law, if livery were made in view of the land, the feoffment did not operate unless entry were made in the lifetime of the feoffor and feoffee; *Co. Lit.* 48. b. So in grants to be perfected by attornment, the attornment must be made in the lifetime of the parties; *Co. Lit.* 309. a. But these

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(a) 1 Rep. 173. (b) *Ib.* 99. b. (c) *Cro. Jac.* 512.

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depend on the particular nature of the conveyances: in the one case the authority to enter is personal, and in the other the assent of the tenant to the grant of the lord is also personal; and the death of either of the parties is therefore necessarily a countermand. But in the case of a conveyance to such uses as J. S. shall appoint, J. S. may appoint after the death of the grantor, though it must be done in the lifetime of the grantee. And even at common law the death of one party will not operate as a countermand where the reason ceases; as in the case of an exchange, where if one enter, and the other die before entry, his heir may enter; and yet till entry the old estate continued, and would descend to the heir of him who entered in case he had died before the entry of the other into his part. In the case of copyholds which pass by the surrender, and which is a common law conveyance, though the estate descend to the heir of the surrenderee who dies before admittance, yet the admittance is necessary to perfect the estate, and till admittance the wife of the surrenderor is entitled to dower, defeazible however by the entry of the heir of the surrenderee. Then if admittance after the death of the surrenderor or surrenderee is the same as if done in their lifetime, why may not the enrolment have the like operation here by relation? In *Perryman's* case (a), where the custom was that free land should not pass without presentment of the feoffment, &c. by the homage at the next court; yet it was holden that a presentment according to the custom after the death of the feoffor or feoffee would be good, on the ground that it fortified the reason of the common law. Secondly, The deed of 1791 was in itself a good execution of the power. That deed was enrolled in the lifetime of *Thomas Hawkins*, and had the assent of all the necessary parties. It is objected that the assent of *Tuite* was by letter of attorney only, but that is not inconsistent with the terms of the power: for all that is required is that the assent should be in writing, which this was; and the power extending to the assent of the executor or administrator of the surviving trustee shews that it was not necessarily intended to be a personal assent; and being only required to be in writing, it need not be by deed, though the execution of the power by *Thomas Hawkins* himself was to be by deed or instrument in wri-

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(a) 5 Rep. 84.

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ting; therefore an assent in writing by a distinct instrument was in the contemplation of the settlors. [The Court here intimating a decided opinion against him upon this part of the case, on the ground that it would operate as a total destruction of the check intended by requiring the personal approbation of the trustees, he said he would not press it any further.] Thirdly, At all events the two deeds of 1791 and 1798, taken together, amount to a good revocation. And they may be so taken together as having the same object, and operating as one assurance. The deed of 1798 recites that of 1791, and the doubts that had arisen, and is an express adoption of it in form and substance; and the first deed was inrolled in the lifetime of *Thomas Hawkins*. Then supposing the assent of one of the trustees not to be sufficiently obtained to the first deed, yet such assent was expressly given to it in the second deed referring to the former, and being *in writing* as required by the power, that is sufficient, without being *by deed inrolled*, or in the same deed. The language of the clause is very different in *Goodright v. Cator* (a), where the consent of the trustees to a revocation of this description was required. Neither are the trustees restricted from giving their assent as well after as before the inrolment of the deed. As where at common law a bishop could not aliene without the consent of the dean and chapter, yet it was holden that such assent might be given before or after the deed of alienation, and by the same or a different instrument; *Foord's case* (b); and it was not necessary that the deed of assent of the dean and chapter should be inrolled, but the deed of the bishop would take effect from the inrolment. 4 *Bac. Abr. tit. Leases*, (G), f. 4. which cites *Co. Lit. 300. b.* Two instruments may be taken together as a good execution of a power, though each singly would be defective; as in the Earl of *Leicester's case* (c), and in *Herring v. Brown* (d), where the rule is laid down that conveyances are to be construed so as to effectuate the intention of the parties. If the Court should incline against the plaintiff on all these points, then he contended that *Thomas Hawkins* having an inchoate interest in the premises at the time of making

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(a) *Dougl.* 478. (b) 5 *Rep.* 81. (c) 1 *Ventr.* 278.

(d) *Carth.* 22. This was before the stat. 4 *Ann. c.* 16. f. 15. enabling the uses of fines to be declared by deeds executed afterwards.

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his will, the inolment after his death was sufficient to give effect to the devise. And cited *Selwyn v. Selwyn* (a), where the son tenant in tail joined with the father tenant for life in a bargain and sale, dated 12th of *April*, to J. W. and his heirs, to make him tenant of the freehold, to the end that a common recovery might be suffered to the use of the father for life, remainder to the use of the son in fee. A writ of entry was sued out returnable on the second return of *Trinity* term, which began on the 7th of *June* and ended on the 20th; and on the 8th the son made his will; and on the 22d of *June* the sheriff executed the writ of seisin, and made his return on the 26th, and the son died on the 27th: yet held that he had a deviseable interest in the premises, though he had devised the estate before he was tenant in fee; on the ground principally, as appears by a MS. note, that before the recovery was complete the son was entitled to a future use. Upon the second part of the case, whether it were necessary that *James Broadhurst* should join in the conveyance to a purchaser; he referred to the deed of *April* 1801, which recites that J. B. had declined to execute the will and wished to renounce, and then states his absolute disclaimer: so that it appears that he refused ab initio to take on him the trust. But whatever doubt there might have been at common law, it is clear by the stat. 21 H. 8. c. 4. that when several are appointed executors, though one refuse, the others may sell. *Co. Lit.* 113. a. and *Bonifant v. Greenfield* (b).

Abbott for the defendant. This was not a settlement made by the absolute owner of the estate, but a family settlement on marriage, in which, though the brothers may be volunteers, yet the daughters, who were living at the time of the supposed revocation, were certainly purchasers for a valuable consideration, in whom an estate-tail would vest on *Thomas Hawkins's* death if the power were not well executed: and the question must be considered as if he had disinherited his daughters by his will and disposed of the estate to a stranger. By the settlement the power of revocation and appointment of new uses was only given sub modo; namely, by deed, &c. to be executed by him in the presence of and attested by three witnesses, and to be enrolled, &c. with the consent in writing of certain persons. Every circum-

(a) 2 Burr. 1131.

(b) Cro. Eliz. 80.

stance contained in a power given to tenant for life to defeat the whole settlement, modifying the exercise of such power, is of weight, and must be * strictly complied with. The revocation attempted by the deed of 1791, to which there was only the constructive assent of one of the trustees by means of a general power of attorney before given to T. Hawkins, being abandoned as inefficient per se for that purpose; the next question is, Whether the deed of 1798, which was not inrolled till after the death of Thomas Hawkins, be sufficient within the terms of the power? It is a general rule in the execution of powers that all the circumstances required must be complied with; more especially when the power, as here, is given to the donee of a particular estate, and not reserved by the original owner to himself. The cases are all collected in the 2d vol. of *Hargreave's Jur. Coll.* 113. and the result is, that if six witnesses be required, three will not suffice; if *peers* be the witnesses required, *commoners* cannot be substituted. *Gold* cannot be reserved under a power of leasing at the ancient rent of *silver*; nor *two* old rents consolidated into *one*, though of equal value; nor can part of a farm be leased at a new rent *pro rata*. If *sealing* be required to a *will*, though not incident to such an instrument, the want of it is fatal; and so is the want of a witness to a testamentary disposition of personal property if so required. Not even the trifling circumstance of tendering sixpence can be dispensed with. In these cases there can be no distinction between a legal and equitable execution of a power. *Lord Darlington v. Pultney (a)*. Here then if it were essential that the deed should be inrolled, as is not disputed, that must be done in the lifetime of the party whose act it is taken to be, and cannot be made good by relation after his death. There is a difference between inrolments under the stat. 27 H. 8. c. 16. and inrolments like this directed by the act of the parties. Before that statute a bargain and sale operating under the statute of uses (27 H. 8. c. 10.) was good without inrolment: then the latter statute enacts that no indenture of bargain and sale shall be good *unless* it be inrolled within six months. The word is *unless*, and not *until*. There is a specific time within which the act must be completed, and if so, it stands confirmed ab initio from the delivery: but here,

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(a) Corup. 265.

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where no time is limited for the inrolment, if it be sufficient to inrol it a day after the party's death, it may be done at any distance of time, within the period of limitation for actions. The doctrine of relation would therefore operate very inconveniently. But even under the statute of *H. 8.*, though the inrolment within six months will make the deed good by relation as between the bargainor and bargainee, yet it is not so to all purposes, for it will not make an intermediate lease good. *Bellingham v. Alfop* (a), *Ifcham v. Morrice* (b), and *Berris v. Bowyer* (c). The case of *Butler v. Baker* (d), lays down these rules for regulating the doctrine of relation; 1st, that it is not allowed in destruction of a lawful estate vested; 2dly, that it shall help acts in law, but not acts of the parties which are in themselves void; 3dly, that it shall extend only between the same parties; and never be strained to the prejudice of third persons, who are no parties or privies to the act. The first and third rule taken together amount to this, that relation of law shall not be allowed to destroy an estate vested in a third person who is no party to the act to which such relation is to apply: and both this and the second rule will be violated if the relation contended for take place. (In support of the first and third rule he cited) *Albany's case* (e), *Hinde's case* (f), *Digges' case* (g), and *Thomson v. Leach* (h). Now here the daughters of *T. Hawkins* are in by a title antecedent to the deed and will under which the appointees claim, namely, under the original settlement. (In support of the second rule he cited) *Bellingham v. Alfop* (i), *Ifcham v. Morrice* (k), the case of the king's patent (l), *Perry v. Bowes* (m), *Elliott v. Danby* (n), *Bennet v. Gawdy* (o), the Duke of *Marlborough v. Lord Godolphin* (p), and *Moss v. Charnock* (q). In *Perry v. Bowes*, the reason is assigned why in the case of a recognition acknowledged before a Judge, it binds the lands, when afterwards recorded, from the time of the caption; *because it is*

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| (a) <i>Cro. Jac.</i> 52. | (b) <i>Cro. Car.</i> 110. | (c) 2 <i>Show.</i> 156. |
| (d) 3 <i>Rep.</i> 28, 29. | (e) 1 <i>Rep.</i> 110. | (f) 4 <i>Rep.</i> 70. b. |
| (g) 1 <i>Rep.</i> 173. | (h) 2 <i>Ventr.</i> 198. | (i) <i>Cro. Jac.</i> 52. |
| (k) <i>Cro. Car.</i> 110. | (l) Mentioned in 2 <i>Show.</i> 157. | |
| (m) 1 <i>Ventr.</i> 360. and <i>T. Jen.</i> 196. | (n) 12 <i>Mod.</i> 3. | |
| (o) 1 <i>Show.</i> 200. and <i>Carth.</i> 178. | (p) 2 <i>Vef.</i> 61. | |
| (q) <i>Ante</i> , 2 vol. 299. | | |

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a judicial act, of which the caption is the principal, and so binds from the time: that therefore is not, properly speaking, a question of relation, but rather from what time the act itself takes its inception; and the Court say that it is the acknowledgment itself which gives it validity. And this applies as well to *Hall v. Wingfield* (a). *Shelley's case* (b) does not apply; for the Court there held that the judgment in the recovery obtained on the same day that *Edward Shelley* died was binding proprio vigore upon the parties, independent of any question of relation. The cases of copyhold proceed upon the peculiar nature of the estate; which, as between the surrenderor and surrenderee, passes entirely by the surrender; admittance being only necessary as between the latter and the lord. *Holdfast v. Clapham* (c). adly, If the inrolment cannot operate by relation, it cannot operate at all in this case. The power is given to the tenant for life; it is annexed to his estate, and must be executed completely during the continuance of that estate. Upon his death eo instanti his daughters became tenants in tail by virtue of the original settlement, and their estates cannot be divested by the inrolment made by other persons. The cases of fines, and of grants at common law, not complete at the death of the parties, apply here: and there is no such distinction as that attempted to be shewn between grants at common law and under the statute of uses; for many of the cases before cited are of the latter description. Whatever interest vests under the deed of revocation must have vested in *T. H.* himself, which could not be after his death. The inrolment must be *his* act to whom the power is given to revoke by deed indented and *inrolled*; but how can an act be attributed to one who was dead at the time? It is not enough that he intended to do the act; for he might alter his intention at any time before the final completion of it. Perhaps the very reason why it was not immediately inrolled was on account of his own doubts. It does not even appear that he had given directions to have it inrolled before his death; which at least ought to have been shewn. Then as to *T. Hawkins* having before inrolment a possibility of interest, which he might devise, even admitting that the deed could have effect given to it from the date of the inrolment, this was not a *devisable*, because not

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(a) *Hob.* 195. (b) 1 *Rep.* 93. (c) 1 *Term Rep.* 600.

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a *descendible*, interest. It is not every moral possibility that is descendible or deviseable; an eldest son dying before his father who is seised in fee cannot devise the * possibility which he had of enjoying the inheritance. In *Selwyn v. Selwyn* (d), the interest of the testator was descendible, because he outlived the completion of the recovery; he lived to see that conveyance complete, out of which the uses were to arise: but here *Thomas Hawkins* died before the completion of the conveyance which was to give him the contingency deviseable. As to the argument that both deeds taken together are sufficient to revoke the settlement, though neither of them per se can so operate, and that the consent of the trustees need not be by the same instrument, it is incongruous on the face of the proposition that two invalid instruments can make a valid one: the cases of Lord *Leicester* (b) and *Herring v. Brown* (c), cited in support of it, do not apply; for those were cases of powers executed by deed and fine, where the fine levied and the deed to declare the uses were intended to have the same operation; it was all meant as one conveyance; and therefore differed from *Digges'* case, where the fine was to uses different from those to which the bargain and sale was made. The two deeds here, however, were not intended to operate as one conveyance; but each was executed as a perfect act at the time. *R. Tuile*, the trustee, does not by the second deed give his assent to the first, but to the new deed to be afterwards enrolled. This appears by the language of the deed of 1798 itself. As to the second branch of the case; Whether, supposing there was a good revocation, *J. Broadhurst*, one of the executors and trustees, were a necessary party to the conveyance? he admitted that he could not maintain the affirmative, since the stat. of H. 8. and the cases decided on it; particularly *Bonifant v. Greenfield* (d). The reason of its having been required in this case was on account of the provision that the receipt of all the trustees named for the purchase-money should be a discharge to the purchaser.

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Williams Serjt. in reply said, that the power coming from the person who had the principal interest and estate of inheritance in the property, though not the absolute fee, was to be con-

(a) 1 *Blac.* 222.

(b) 1 *Ventr.* 279.

(c) *Ib.* 368. 371.

(d) *Cro. Eliz.* 88.

frued liberally, and not as in cases where there was a power to encumber the estate of a third person. That no inconvenience could ensue from the length of time which might intervene before the inrolment; for the daughters of *T. H.* having an estate tail vested in them from the death of their father before the inrolment might defeat the revocation by suffering a recovery in the mean time: for which he relied on *Digger's* case (a), *Nicholls v. Sheffield* (b), and *Page v. Hayward* (c). He admitted that the ceremony of inrolment was necessary, but contended that it was good if done at any time. That the objection to the divesting of the daughters' estate by relation could not hold, because that would equally have been the case if the inrolment had been made in the lifetime of *T. H.*: and the delay cannot be objected to by them, because it gave them the greater chance to defeat the execution of the revocation by suffering a recovery in the mean time. And he observed, that the appointees would take here not by the will, but by relation back to the original power. In addition to the cases before mentioned he referred to *Needler v. The Bishop of Winchester* (d), where *S.* and his wife being seised of a parsonage to them and the heirs of *S.*, granted the same to King *H. 8.* and his heirs by deed of 10th of *May* 1531. And then the king, by letters patent dated 21st of *July* following, granted another parsonage to them and the heirs of *S.* in consideration of the other, and on the 26th of *July*, *S.* and his wife acknowledged and inrolled the deed, and held that though it was not complete nor perfected for want of inrolment at the time of the king's grant, yet when the inrolment came it took effect from the first act; and therefore that between the parties it should bind to all purposes ab initio, though in a collateral respect: and therefore the case cited from *Cro. Jac.* 52. cannot be law. He denied that in copyholds the estate passed out of the surrenderor till admittance of the surrenderee, though after admittance it will relate back, which was the case of *Doe v. Clapham*. The case of *Moss v. Charnock* went on the ground of public policy, and the registering was not a mere matter of ceremony as

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(a) 1 *Rep.* 173.(b) 2 *Bro. Chan. Cas.* 215.(c) 2 *Salk.* 570.(d) *Hob.* 222.

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the enrolment in this case. He also recapitulated the principal cases cited by him before, and relied on them in answer to some of the cases cited by the defendant's counsel.

At the conclusion of the argument it was observed by one of the Judges, that it did not appear when *Tuite* executed the deed of assent: but it was admitted to be during the life of *T. Hawkins*.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

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This was an action of assumpsit brought to recover the unpaid remainder of a sum of 7005*l.*, the purchase-money of certain parts of an estate, which had been sold by the plaintiffs by auction, and purchased by the defendant thereat, under certain conditions of sale, and whereupon the defendant had paid 1400*l.* by way of deposit. The plaintiffs in their declaration aver, that they were ready and willing to make out, and did make out, a good title to the parts of the estate sold by them, according to the conditions of sale, and were also ready and willing to execute a conveyance, and to deliver possession accordingly, but that the defendant dispensed with their so doing, and discharged them therefrom, and wholly refused to pay the remainder of the said purchase-money demanded. The defendant pleaded the general issue non assumpsit. The case came on to be tried before me, and a verdict was found for the plaintiff, subject to the opinion of the Court on a case disclosing the whole transaction. [His lordship here stated the substance of the case reserved in manner before stated; and then continued.] The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? And that question was agreed between the parties to depend on the following questions: First, Whether the uses limited by the deed of the 12th of *May* 1770 have been well revoked by all or any of the subsequent deeds, and the will of *Thomas Hawkins*, so as that the devisees named in the said will could make a good title to a purchaser? Secondly, Whether it were necessary that the said *James Broadhurst* should join in
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conveyance to a purchaser? The latter of these questions was properly abandoned by the defendant's counsel, as not capable * of being contended for with effect on the part of his client.

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The question then which remains for determination is, Whether the uses limited by the deed of 1770 have been well revoked by all or any of the subsequent deeds, and by the will of *Thomas Hawkins*? In the first place, the deed poll of the 17th of *July* 1791, executed by *Thomas Hawkins* as attorney for *Robert Tuite*, may be laid out of the question, inasmuch as it is a deed which is neither competent to revoke the old uses of the indenture of the 12th of *May* 1770, or to declare new uses. The consent and approbation of *Robert Tuite* (amongst others) was by the indenture of 1770 made necessary to the revocation of the old uses, and the declaration of new uses by *Thomas Hawkins*. It was so made necessary for the purpose of erecting an independent check and control in *Robert Tuite* and the other trustees over the disposition of this property by *Thomas Hawkins*. Indeed the validity of the revocation and appointment executed under the authority of the power of attorney appeared to the counsel for the plaintiffs so little maintainable, that it was, upon an intimation from the Court of what would probably be its opinion upon that head, at an early period of the argument abandoned; at least as to its being of itself a substantive and effectual deed of revocation and appointment. But the enrolment which that deed of 1791 received, was afterwards endeavoured in argument to be transferred and handed over to the deed of 1798, in order to obviate the want of enrolment in the life of *Thomas Hawkins*, under which that deed laboured. And in support of this attempt Lord *Leicester's* case, 1 *Vent.* 278. was relied on. There Lord *Leicester*, having a power by writing indented, subscribed by his hand and sealed, to revoke uses, covenanted by writing sealed and subscribed by his hand to levy a fine to other uses; which fine was afterwards levied: and although neither instrument was of itself sufficient to revoke the old uses, Lord *Hale* held that conjointly they would do it: observing upon that occasion, *quæ non profunt singula juncta*

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juvant. But that authority will not assist the plaintiffs in this case; for there it was the intention of the Earl of Leicester that the covenant and fine should revoke the uses; but in this case *there is no intent that the two deeds conjointly should revoke the uses* and that the inrolment of the first should be applied to, or be in any way connected with, the second. On the contrary, the deed of 1798 in the body of it takes notice of the inrolment as an act *to be done* in respect of the *then executing deed*; thereby not only adverting to the *necessity* of a *actual inrolment*, but *virtually disclaiming the benefit* (if indeed in any shape such benefit could have been derived from it) of the inrolment of the former inefficacious deed of revocation and appointment of the 17th of July 1791.

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Before I proceed to consider the arguments on which the deed of the 4th of December 1798 was contended to be a good execution of the power, I will state what the terms of that power require: it being remembered that the only objection is, that this deed was not inrolled until after Mr. Hawkins' death. The terms required that the revocation should be by a deed or instrument in writing, executed in the presence of and attested by three credible witnesses, and inrolled in one of his majesty's courts of record at Westminster, and with the consent and approbation of Hawkins' wife, his father, father-in-law, the trustees of a term of 500 years in the settlement of 1770, and also all the trustees to support contingent remainders, being in all nine persons. Every one of these required circumstances is in itself perfectly arbitrary, and (except only as it is in fact required) unessential in point of effect to the legal validity of any instrument by which the old uses should be revoked, or new uses declared. It is in itself immaterial whether the instrument in writing, purporting so to revoke and declare the uses, should be by deed: whether such deed should be executed in the presence of what and how many witnesses: whether it should be afterwards attested by the witnesses, and ultimately inrolled in any court of record: and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might, (if it had so pleased the parties creating the power), have been done by any writing of the persons so authorized, *unsealed, unattested, uninrolled, and unsanctioned*

unfashioned by any consent or approbation whatsoever. If these circumstances be unessential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting any substitution; because these requisitions have no spirit in them which can be otherwise satisfied; incapable of receiving any equivalent, because they are in themselves of no value. And indeed in this case the inrollment has been considered on both sides as a thing necessary to be done at some time or another; and which, after *Digger's* case, could not be denied. And the question on this part of the case is only whether it can have any effect, as it was not done in *Thomas Hawkins's* lifetime? And this question depends upon what shall be a fair construction of the clause giving the power; in making which the Court is to decide according to what they shall judge to be the intention of the parties, not restraining or lessening the power by a narrow and rigid construction, nor by a loose and extended interpretation dispensing with the substance of what was meant to be performed. And looking at the question in that light, we are of opinion, that this power *has not been well executed*.

My brother *Williams*, who argued that it was well executed, contended, that the deed of revocation was perfect without inrollment; that it was a *mere ceremony*, something *collateral*, which might be done *at any time*, and that there was nothing *personal* in the enrollment; and in the course of his argument pointed our attention to some of the differences between conveyances at common law and by the statute of uses: citing in support of the points he contended for, amongst other cases, the case of *Hall and Wingfield*, *Hob. 195.*, which was the case of the inrollment of a recognizance; *Shelley's* case, *1 Rep. 99.*, where an execution on a common recovery, taken out after the death of the tenant in tail suffering the recovery, was holden to vest the uses in *Richard Shelley*, and to take the estate from the heir of *Edward Shelley*, to whom it had descended; and *Perryman's* case, *5 Rep.*, where, the custom of a manor being that every alienation of lands within it should be *presented at some court within*

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within a year, it is laid down that the presentment may be made after the death of the feoffor or feoffee : and reasoning from the analogy, which he conceived to subsist, between the case at bar, and surrenders of copyholds, and of exchanges, where the title may be perfected by entry after the death of either party.

On the other side it was contended, that the inrollment, according to the general doctrine of powers, ought to have been in the life of *Thomas Hawkins* : that the mischief would be enormous of allowing an enrollment at any period, as no time is limited by the deed : that the relation contended for would operate to the destruction of a lawful estate vested in *Thomas Hawkins's* daughters, and to make good void acts of the parties ; which cannot be. And in support of these positions, *Albany's* case, *Hyde's* case, and *Digger's*, in Lord Coke, *Perry v. Bowes*, in Sir *Thomas Jones*, *The Duke of Marlborough v. Lord Godolphin*, 2 *Vesey* 61., and other cases were cited.

To some of the positions on which my brother *William* rested his argument we do not agree. There is a fallacy in laying it down, that the deed of revocation was perfect without inrollment. For as the power of revocation depends entirely on those steps being pursued, which the persons creating the power have prescribed, the point is not whether a deed, which may be one of the things necessary to work a revocation, has all the circumstances belonging to it which the law requires to give validity to a deed, as such : but the question is, Whether it be perfect, as that *particular instrument* which is required for the purpose of effecting a revocation. A deed, quæ deed, certainly requires no inrollment to give it validity ; that is not a thing which arises from or is connected with the nature of the instrument itself. But if an instrument, attended with all the circumstances necessary to the perfection of a deed, will not operate to effect a revocation from the omission of certain other circumstances which have been required by the authors of the power, those omitted circumstances are on that account most unquestionably necessary to the validity of that instrument,

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which is to effect the revocation; and in such case the inrollment becomes as essential to such an instrument as the sealing and delivery thereof. If there were no sealing and delivery there would be no deed: and if inrollment be wanting, though there be a sealing and delivery, the prescribed instrument of revocation is not completed; and if not complete, cannot be valid and effectual for that purpose.

Another position of my brother *Williams* with which we cannot agree is, that there was in the inrollment nothing *personal*. If by that, it had been only meant, that the act of inrollment need not be by the hands of *Hawkins* himself, of that there can be no doubt; but there can be no question but that every step of the revocation, excepting the consent of the persons named for that purpose, rested entirely with Mr. *Hawkins*: that he might stop where he pleased; and that if he had resolved to leave the revocation imperfect by not pursuing it through all the necessary steps, it was entirely with him so to do. An inrollment could not have been made without his authority. One object of the inrollment might be to afford a period for consideration, after all other steps to revoke the old uses and appoint new ones had been taken: and if that were the object, could a stranger during his life, after all those steps had been gone through, be allowed to inroll the deed, and to do that which remained, and was necessary to complete the revocation, without *Thomas Hawkins's* authority, or even against his will? Which would be the case, if there were nothing personal in the inrollment.

The difference between conveyances by the statute of uses and at common law are unquestionably very great, and much may be done in the one way, which could not be effected by feoffment, grant, and the other modes of transferring property which obtained prior to the statute. But the matters alluded to, such as limiting estates of freehold in futuro, the defeating estates either wholly, or partially, in favour of others than the grantor and his heirs, &c., are questions of a very different description from that now before us. We are not now considering

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ing what effect an instrument properly executed may have by means of the statute of uses; but whether an instrument intended to defeat uses already created, and to raise new ones, has or has not been executed with the formalities and in the the manner required. How far it may operate, and in what way differently from a conveyance at common law, are questions dependant on the statute of uses; but they are questions which cannot arise until it shall be settled, whether the deed to limit or revoke be or be not well executed? In *Shelley's* case the question, Whether the execution vested the estate in the recoveror? was a question at common law, depending upon a rule of law, that every execution hath relation to the judgment; (*Lillington's* case, 7 Rep. 38.); not at all upon the statute of uses. And upon that principle, though *Edward Shelley* died before the execution, yet inasmuch as it related back to the recovery, which was in his lifetime, the uses of the recovery were holden to be executed in him, and *Richard* his son to be in, in the course of descent. And the same doctrine, as to the relation of the execution, would have holden if the proceeding had been adverse. This observation, therefore, does not distinguish this from the cases of feoffment and no livery, and of grants and no attornment, before the feoffor's and grantor's death; which cannot be completed for want of the existence of one of those, who must be a party, and consenting to the act necessary to complete the conveyance. The question before us is not, as I have observed, as to what may be the operation of the statute of uses upon an incomplete act becoming complete; but, whether that act, without which no use can arise, could be completed after *Thomas Hawkins's* death. And there has been no distinction pointed out between conveyances at common law, and those by the statute of uses as to the consummation of the deed, which in the one case is to convey the estate, and in the other to ascertain the uses; but the distinction is as to the effects of such different instruments after they are consummate and perfect.

The case of a recognizance cited from *Hobart*, 195. is very distinguishable from this case. The objection here is that the whole, which was required of *Thomas Hawkins* to revoke the uses of his marriage settlement, was not performed. But in the case in *Hobart* there was no question whether the cognizor had any thing further to do. The acknowledgment before the Judge gave the recognizance the force of a record. The cognizor had done all he had to do; nothing further was wanting on his part to bind himself or his lands; though the inrollment was necessary for the testification and perpetuating of it. This was an act which might be done in invitum. This distinction applies to some other of the cases cited for the plaintiffs. In *Perryman's* case the feoffor had done all he had to do; after that feoffment he had no control over the estate; nothing further was wanting on his part; nor was his assent necessary to the presentment which the custom required: the procuring that to be done was for the feoffee, and not for the feoffor; so says the book, "Caveat emptor; and he at his peril is to perfect all that is requisite to the assurance." So in the case of a surrender of a copyhold, the admittance is not the act of the surrenderor; there is nothing personal in it as to him: the surrenderer is to procure himself to be admitted, which the surrenderor has no power to prevent. The same observation holds as to the case of an exchange. And however these several instances may prove the doctrine of relation under the circumstances attending them, they all fail of proving any thing to support the plaintiffs' case, unless it had been previously shewn that the inrollment in this case was an act with which *Hawkins* was not concerned, and which might have been done without his consent. The question is not so properly a question of relation, as whether the inrollment can have any effect without *Hawkins's* authority? which necessarily determined with his life.

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Digger's case, in 1 Rep. 173. relied on by the defendant's counsel, is a very material case to shew that the inrollment could not be after the death of *Hawkins*. There *Christopher*
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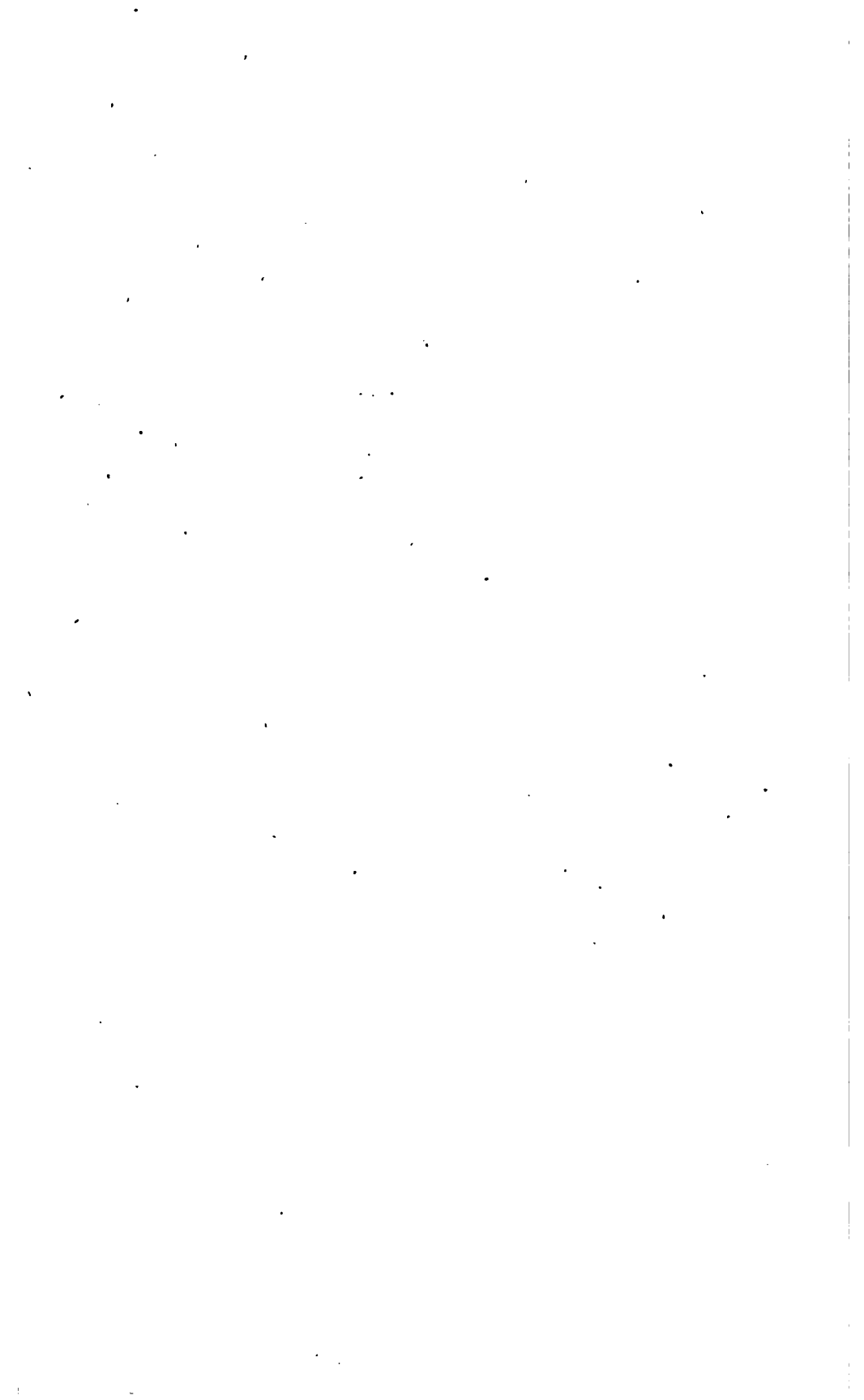
Digger being tenant for life, remainder over, with a power by deed indented to be inrolled in any of the Queen's courts to revoke any of the uses and limit new ones, by deed indented and inrolled in the Court of Common Pleas declared, that for the payment of his debts, &c. from the time of the inrollment of that deed in Chancery all the uses should be void. Afterward he levied a fine of the lands to other uses, and after the levying of such fine the deed of revocation was inrolled in Chancery. And it was holden (by the third resolution) that until that indenture was inrolled, there was no perfect revocation; and (by the fourth resolution) that the fine levied before the inrollment had extinguished the power of revocation. Now see how that case applies to this. If inrollment be a mere ceremony, which may be done at any time, and if, where nothing remains to be done but that, the party executing the power has done all that he has to do; that ceremony, in which according to my brother *Williams* there could be nothing personal in *Christopher Digger*, might have been done by any body. But the resolution of the Court was otherwise: for they held that the fine extinguished the power of revocation; that is, that it destroyed all authority in *C. Digger* to do that, which remained to be done in order to complete the revocation; and nothing then remained to be done, but to make the inrollment. Had it been a mere circumstance therefore, in which there was nothing personal in *Christopher Digger*, there would have been no power remaining in him to be extinguished by the fine; but which power was so extinguished, because it was not collateral, but favoured and tasted of the land, and could only be executed by him who had the estate and interest on which the power was dependant; and under whom, as the donor, the person must come in to whom the new uses should be limited. If then the power of completing the revocation by inrollment were destroyed in that case by parting with the estate, the consequences must be the same, whatever may be the means by which such a separation may happen; and in this case the death of *Thomas Hawkins* has had that effect.

This being the light in which the question strikes us, it will not be necessary to go into other parts of the argument, respecting the doctrine of relations, or the various other questions which have been made in the cause, and which it cannot be necessary to discuss, unless the revocation were completed by the inrollment made after Mr. *Hawkins's* death. And therefore without giving any opinion on those points, we think upon the grounds already stated that there should be judgment for the defendant.

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Postea to the Defendant.

END OF HILARY TERM.



C A S E S

ARGUED AND DETERMINED

1803.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Forty-third Year of the Reign of GEORGE III.

THUNDER on the Demise of WEAVER *against* BELCHER.

Friday,
April 9th.

IN ejectment for certain premises in the county of *Gloucester*, tried before *Lawrence J.* at the last assizes there, the only questions material to be considered were, Whether the defendant were entitled to six months notice to quit, as tenant from year to year; or if not, whether he were not entitled to a notice to quit, as tenant at will, before the action brought.

The material facts were, that the defendant on the 26th of *January* 1800 was let into possession of the premises, as tenant from year to year, by one *Baylis*, who was at that time mortgagor in possession. On the 17th of *January* 1803 *Jenks* the original mortgagee conveyed to the lessor of the plaintiff, who soon after, without any notice to quit, brought this ejectment, and *laid his demise on the 18th of *January* 1803. On the part of the defendant proof was given of a notice to quit received by him on the 24th of *September* 1802 from *Baylis* the mortgagor, to quit at *Lady-day* 1803. But *Lawrence J.* was of opinion that the mortgagee was not bound by any act of the mortgagor in letting the estate after the mortgage; and that as the mortgagor himself might have been ejected without any notice to quit, the tenant who claimed under him could not have a better right to such notice: and therefore the lessor of the plaintiff obtained a verdict.

Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor.

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Wigley now moved for a new trial on the ground of a misdirection of the learned Judge: 1st, Because the mortgagee having suffered the defendant to continue tenant on the premises from *January* 1800, thereby confirmed his tenancy from year to year under the mortgagor. And all the parties living in the same place was evidence that the mortgagee had notice of the tenancy. [Lord *Ellenborough*. The case of *Keech v. Hall* (a) is decisive against the claim of the tenant to notice to quit. He coming in under the mortgagor after the mortgage cannot be in a better condition than the mortgagor himself, who, Lord *Mansfield* said, was tenant at will in the strictest sense, and not entitled to notice to quit.] Then, 2dly, The defendant was at all events tenant at will or by sufferance; and no demand of possession having been made by the mortgagee, nor any refusal of the tenant to attorn, he cannot be considered as a trespasser, which he is assumed to be by the ejectment. *Birch v. Wright* (b). But no ejectment will lie against a tenant at will upon a demise laid before the determination of the will. *Goodtitle v. Herbert* (c). And the leaning of the courts in modern times has been to convert holdings at will, strictly so considered, into tenancies from year to year, as in *Clayton v. Blakey* (d).

Lord ELLENBOROUGH C. J. There rent had been received by the landlord, which raised an implied tenancy from year to year, though the tenant had been originally let in under an invalid lease. But a mortgagor is no more than a tenant at sufferance, not entitled to notice to quit; and one tenant at sufferance cannot make another. The defendant never had any possession under the mortgagee from whence any tenancy could be inferred, and therefore was not entitled to any notice. He could not be said to have any possession under the mortgagee if the mortgagor had no authority to let.

Per Curiam,

Rule refused.

(a) *Dougl.* 32.(b) 1 *Term Rep.* 387.(c) 4 *Term Rep.* 680.(d) 3 *Term Rep.* 3.

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EDWARDS *against* EVANS.Saturday,
April 30th.

IN an action on the bribery act (a) against a voter of *Leominster*, for offering his vote for a certain sum to Mr. *Kinnaird*, who had declared himself a candidate to represent the borough at the last general election for members to serve in parliament, a verdict having been * given for the defendant at the trial before *Lawrence J.* on the last circuit at *Hereford*,

Miles moved to set aside the verdict and to have a new trial, on the ground that a witness of the name of *Bradley* was improperly rejected, under these circumstances. Mr. *Kinnaird* was first called as a witness on the part of the plaintiff, to prove a conversation which took place between him and the defendant, at which *Bradley* also was present. Being first examined on the voir dire, it appeared that an action was pending against him also for bribery, which was at issue: and to a question, Whether, in case this defendant was convicted upon his testimony, and the action against himself was also prosecuted to conviction, he should avail himself of the indemnity given him by the bribery act as the first discoverer? He answered, that he did not know whether he were the first discoverer or not; but that if he were, he should certainly avail himself of all legal advantages to protect himself. Whereupon he was then rejected as an incompetent witness, on the ground of interest in the event of the cause. *Bradley* was then called, to whom the same questions were put on the voir dire, and the same answers were given by him, as to the action pending against him, and his intention to avail himself of all advantages from the conviction of the defendant, if it took place. But it also distinctly appearing that he and not Mr. *Kinnaird* was the first discoverer to the plaintiff of the defendant's offence, he was rejected as a witness interested, and *Kinnaird* was then examined in chief, who proved the conversation between him and the defendant, in which the defendant made a direct offer of giving him his vote for money. The defence set up proceeded upon an admission † of the truth of the conversation as represented by Mr. *Kinnaird*; but it was contended against the witness himself for bribery at the same election, and an acknowledgment by him, that if the defendant were convicted he should avail himself, if necessary, of his having been the first discoverer to the present plaintiff. Quære? [°452] [†453]

(a) 2 Geo. 2. c. 24.

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tended that the offer was made jocularly, in ridicule of the pretensions of Mr. *Kinnaird*, who as a stranger to the borough pretended to offer himself as a candidate without paying any money for the votes, which he had disclaimed on his cross-examination any intention of doing. On this defence the question went to the jury, with the observation of the learned Judge to them, that he saw no reason for supposing that the defendant's offer of his vote for money was not meant seriously by him: but the jury found a verdict for the defendant on that ground.

The motion for the new trial was urged on the ground that *Bradley* was a competent witness, notwithstanding the pendency of the action for bribery against him; for that no interest was vested in him at that time, it being a contingency whether that action would be persevered in, and whether it would be prosecuted with effect; and till conviction the witness must be presumed to be innocent; and that even then it was contingent whether he could avail himself of it, as some other prior discoverer might appear; or if he could, whether he would do so. But in order to found an objection to a witness on the ground of interest, it must be an interest then existing, and not a mere future expectancy of an interest. That as it would be no answer to an objection to the interest of a witness that he did not mean to use it, so it cannot found an objection on the ground of interest that a party will use it, if in point of law none really exist at the time. That besides, it was contrary to the policy of the bribery act to exclude the testimony of either of the parties to the bribery; for in general these matters passed between the parties themselves, and it was meant to subject them both to the danger and penalty of such acts, and to encourage them to impeach each other by offering an indemnity to the first discoverer. That neither in *Sutton v. Bishop* (a), nor in the *Cricklade* cases in 1781 for bribery, which were long and ably contested, was any such objection conceived to lie to the witnesses examined, who stood in the same situation with *Bradley*.

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The Court here intimating that, if the question had turned merely on the objection to the witness on the point of interest, they should have thought it material enough to be considered more fully upon a rule to shew cause, observed that it became unnecessary to discuss that; for the defence had proceeded altogether upon a collateral fact to that which *Bradley* the rejected

(a) 4 Burr. 2283. and 1 Blac. 665.

witness was called to confirm, namely, the conversation which took place between *Kinnaird* and the defendant, which was admitted by the defendant to have been truly stated by the plaintiff's first witness.

Miller then observed, that it was impossible to state what effect the evidence of another witness to the same conversation might have had on the jury. He could not pretend to say what other circumstances might have come out on his examination which would have impressed the jury more strongly with the belief that the conversation was seriously intended by the defendant. That it had always been understood, that if the witness called was competent at the time, and ought to have been received to give the evidence which was relative to the cause, the greater or less degree of weight due to his testimony could not be a ground for his rejection. If the evidence offered were relative at the time, the admission or rejection of the witness could not depend upon the defence afterwards set up in argument to the jury. But the materiality of it must be considered at the time when it was offered.

Lord ELLENBOROUGH C. J. If the question turned on the latter ground I should be inclined to grant a rule to shew cause, it being a point very important to be considered. But here the issue which went to the jury was on a fact quite collateral and immaterial to what the witness was called to prove. For the evidence of Mr. *Kinnaird*, which *Bradley* was called to corroborate, was admitted to be true, and the defence made was quite collateral to it, on which the verdict was given. There therefore seems no occasion for the interference of the Court.

GROSE J. declared his opinion to the same effect; and observed that it was no ground for granting a new trial on account of the rejection of a witness to a fact, which was admitted to be true, and was not inconsistent with the ground on which the verdict proceeded.

LAWRENCE J. When a new trial is moved for on account of the improper rejection of a witness, the first inquiry always made is, What the witness would have proved, and whether it were material to the issue? Now here Mr. *Kinnaird* had proved the conversation which passed between him and the defendant; to corroborate which, *Bradley*, who was also present at the time, was called; and if the defence had proceeded on any contradiction of what had passed on that occasion, his

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testimony might have been material to be adduced; but the defence did not go on a denial of Mr. *Kinnaird's* evidence, but * admitting his account of the conversation to be exactly correct, and it not being suggested at the time that *Bradley* could carry the evidence further, the defence was, that what was said by the defendant was in joke, and by way of ridiculing the pretensions of a stranger candidate who professed that it was not his intention to offer money for votes. The question went to the jury on that ground; with my observation that there did not appear to me to be any reason for supposing that the offer was not seriously made by the defendant, but if they thought otherwise, that would be a defence; and they found on that ground for the defendant. If the testimony of *Bradley* had been offered as tending to carry the evidence of what passed further than Mr. *Kinnaird* had done, or to alter the impression which was to be deduced from it, and it had been rejected, that would be a ground to apply for a new trial, supposing him to have been a competent witness. If the question turned on the general ground of objection to the competency of the witness, it would be very material to be considered.

LE BLANC J. The ground on which new trials are granted, on account of the rejection of a witness who was prepared to give evidence relative to the issue, is, that the Court cannot weigh the degree of relevancy, or say what effect any fact that is relevant would have had on the minds of the jury. But where the objection merely is, that what was proved by one witness could have been proved by two: there being no denial of the fact which he was called to prove on the part of the defendant, but the defendant going to the jury on a defence altogether collateral to that fact, there is no ground for the Court to interfere by granting a new trial.

Rule refused.

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HILES *against* The Inhabitants of the Hundred of SHREWSBURY.

Tuesday,
May 3d.

THIS was an action brought by the plaintiff against the hundred of *Shrewsbury* to recover damages to the amount of 200*l.* sustained by the plaintiff from a fire in the building hereafter described, which had been wilfully set on fire. The first count of the declaration stated, that on the 9th of *May* 1801, at the town of *Shrewsbury* in the said hundred of *Shrewsbury* in the county of *Salop*, certain persons unknown with force and arms wilfully, unlawfully, maliciously, and feloniously did set fire to a certain *out-house* of the plaintiff situate in the said hundred, &c., and thereby wilfully, &c. burned the same, and certain *mill-wheels, works, and machinery in the same*, being of 300*l.* value, and also large quantities of corn, &c. of 200*l.* value in the same, in contempt, &c. It then stated the several other necessary proceedings, as notice to the inhabitants, and the plaintiff's examination before a justice of the peace, and that the offenders had not been apprehended or convicted, nor the damage paid, &c. In the second count the building was described as "*a certain house*," and in the third count as "*a certain barn*." Plea, not guilty. At the trial at the Summer Assizes at *Shrewsbury*, 1802, before *Le Blanc J.*, the plaintiff obtained a verdict for 200*l.*, subject to the opinion of the Court on the following case,

The burning of a *mill-house*, not parcel of any dwelling-house, is not felony within the stat. 9 *G. 1. c. 22.* which gives a remedy to the party grieved against the hundred, though within the stat. 9 *Geo. 3.* which omits the remedial clause.

The building in question, situate in the abovementioned hundred, was a substantial building or *mill-house*, wherein was a corn-mill, adjoining to another building under the same roof, the lower part of which was used as a cow-house and hemp-mill, and the upper part as a snuff-mill; and adjoining to that also under the same roof a cottage or dwelling-house, where formerly one of the plaintiff's servants employed in the corn-mill used to sleep, but there was no passage or interior communication between the cottage or the cow-house and hemp-mill into the corn-mill without going out of doors. The whole was in the plaintiff's occupation, except the snuff-mill. No part of the cottage or the cow-house and hemp-mill was injured, except a small part of the cow-house wall. The corn-mill was wilfully set on fire by persons unknown in the night between the 8th and 9th of *May* 1801, and totally destroyed; the damage above 600*l.* The mill was in the ground floor, over which were two floors, the upper one over the water-wheel used as a granary, the

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roof and floors of which were totally destroyed, to the amount of above 200*l*. (There was a plan annexed, describing the building and damage.) The plaintiff gave immediate notice on the 9th to several inhabitants of the hundred, and on the 11th of May 1801 gave in his examination before E. S. Esq. a justice of peace in and for the town of *Shrewsbury* and hundred aforesaid, who by virtue of ne intromittant clauses in several charters granted to the said town have exclusive jurisdiction over the place in question, as follows: "The examination of *Thomas Hiles* of, &c. in the town of *Shrewsbury*, taken before me, one of his Majesty's justices of the peace for the said town and liberties, this 11th of May 1801, who upon his oath saith, &c. (The examination, upon which no question turned, set forth the circumstances of the fire, and concluded with saying that the mill and stock were entirely consumed, and that the examinant had not any knowledge whatsoever of any person or persons who set the said mill on fire.) The original writ was tested and sued out on the 27th of April, 42 Geo. 3., and none of the offenders have been discovered. It was objected on the part of the defendants, that no part of the building destroyed or damaged was such as entitled the plaintiff to recover. But that if the cow-house and granary should be so holden, yet the examination was not sufficient, as not being taken before a proper magistrate. The question for the opinion of the Court was, Whether notwithstanding these objections the plaintiff were entitled to recover any damages for the injury he has sustained?"

Wigley for the plaintiff. The words of the Black Act, 9 G. 1. c. 22. *f.* 1 & 7. which describes the offence and gives the remedy against the hundred, are "house, barn, or out-house." This was rather meant to extend than limit the common law definition of arson; and by Lord *Coke* (a), Lord *Hale* (b), and *Hawkins* (c), arson at common law is the burning *the house* of another, which is intended not only of inset houses parcel of the mansion, but of *outset* houses also, as barn, stable, cow-house, &c. and the like, parcel of the mansion; and it is not necessary in the indictment to charge it to be domum mansionalem, as in burglary. It is true that the stat. 9 Geo. 3. c. 29. (d) was passed to make the burning of *mills* capital; considering the offence as

(a) 3 *Inst.* 67. (b) 1 *Hale*, 567. (c) 1 *Hawk. P. C. ch.* 39.

(d) This statute does not extend the remedy given by the former statute against the hundred.

not included in the former statute; but probably that was intended merely to reach the mere machinery of the mill, and was not necessary to protect the mill *house* or substantial fabrick of the building. And in *Taylor's* case (a) a doubt arose subsequent to that statute * whether a *mill* were not an *out-house* within the stat. 9 *Geo.* 1., upon which the Judges gave no opinion.

LORD ELLENBOROUGH C. J. Although the offence of arson need not be laid in the indictment to be committed against the *mansion house*, but it is sufficient to lay it to be against the *house* of another, still it is necessary in evidence to connect the building burned in some way with the mansion-house, so as to shew that it is parcel thereof. Now here the mill is not shewn to be connected with any dwelling house. The stat. 9 *Geo.* 3. c. 29. was passed on purpose to extend to mills, that is, whether or not parcel of any dwelling-house. But that act does not give any remedy against the hundred. The action therefore can only be sustained by bringing the case within the stat. 9 *Geo.* 1., the words of which are house, barn, or out-house, that is, such house or out-house of which arson might be committed at common law: now the premises burned are clearly not a dwelling-house, nor a barn, nor an out-house belonging to a dwelling-house.

LAWRENCE J. What is a *mill-house*, as stated in the case, but a *mill*; which, *as such*, is not included in the stat. 9 *Geo.* 1.; the burning of which is expressly provided for by the subsequent act, so far as respects the offence, but it does not include the remedy against the hundred. The case of *Taylor* only determined that burning paper in a house was not burning a house. It was unnecessary to consider any other question.

Per Curiam,

Postea to the Defendants.

(a) 1 *Leach*, 58.

COARE against GIBLETT.

DEBT on bond, dated 24th of *December* 1796, in the penal sum of 2800*l.* The defendant cravedoyer of the bond (by which it appeared to be a bond by the defendant singly to by which certain persons became bound to the grantee, may be explained by a subsequent part setting forth another bond, in which the first is recited as a joint and several bond; such recital not being inconsistent with the preceding allegation, but only explaining what was before left short in the description of the first bond.

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Tuesday,
May 3d.

The first part
of a memorial
of an annuity
stating a bond

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the plaintiff) and of the condition, which reciting that whereas *W. S., G. S., R. N., C. C., and D. S.* had contracted with the plaintiff to grant him an annuity of 155*l.* 11*s.* 1*d.* for the life of the survivor of them the said *W. S., G. S., &c.* at the price of 1400*l.* which was that day paid to their use: and whereas by a bond of the same date the said *W. S., G. S., &c.* (all but *C. C.*) became *jointly and severally* bound, and it was intended that *C. C.* should also have been bound to the plaintiff in 2800*l.* conditioned to pay the plaintiff an annuity of 155*l.* 11*s.* 1*d.* during the life of the survivor of them (the grantors): and whereas the said *C. C.* had by accident been rendered incapable of executing the said bond on that day, and therefore the defendant at the request of the other grantors had agreed to become a surety with them for the payment of the annuity: was that the bond (on which this action was brought) should be void if the said annuity were truly paid during the life of the survivor of the persons above named. And then the defendant pleaded, 1*st*, non est factum, and 2*dly*, that the plaintiff within twenty days after the execution of the said bond caused a memorial of that and of certain other instruments and assurances for granting and securing the said annuity to be *inrolled* in the Court of Chancery as follows: "A memorial to be inrolled, &c. of a *bond* dated 24*th* of *December* 1796, whereby *W. S., G. S., R. N., C. C., and D. S.* (but which bond is not yet executed by the said *C. C.*) in consideration of 1400*l.* on that day paid to the said *W. S., G. S., &c.* became bound unto the said *William Coare* (the plaintiff) in the sum of 2800*l.* conditioned for payment, &c. And also of a memorandum indorsed thereon, whereby, &c. And also of a warrant of attorney, &c. And also of a bond dated 24*th* of *December* 1796, whereby *P. Giblett* (the defendant) became bound unto *W. C.* (the plaintiff) in 2800*l.*, and whereby, after reciting that the said *W. S., G. S., &c.* had agreed with the plaintiff to grant him an annuity of 155*l.* 11*s.* 1*d.* during the life of the survivor of them at the price of 1400*l.*, and which sum the plaintiff had that day paid to their use, &c.: also reciting that by a bond, meaning the bond before stated, bearing even date therewith, the said *W. S., G. S., &c.* became *jointly and severally* bound, and that it was intended that the said *C. C.* should also have become bound, &c. (as before mentioned). Also reciting that the defendant had agreed to become bound as surety, &c. (as before mentioned), which he had consented to do," &c. The memorial then proceeded to state the condition of the

the bond as before mentioned, and the other instruments for securing it. The defendant then pleaded that the bond in the memorial first above stated was a certain bond dated the 24th of *December* 1796, and executed by the said *W. S., G. S., &c.* whereby they became *jointly and severally* bound to the plaintiff in 2800*l.* conditioned for the payment of the said annuity, which said memorial was not a good and sufficient memorial of the said last-mentioned bond, &c. according to the form of the statute, by reason of which the bond on which this action is brought is void in law. (There were other objections pleaded to the memorial, which were not insisted upon in argument.) Replication to the second plea, that the memorial was a good and sufficient memorial of the said bond, according to the form of the statute: to which there was a general demurrer, and joinder.

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Reader in support of the demurrer. It appears that the bond of the 24th of *December* 1796 was in truth a *joint and several* bond, and yet in the memorial of that bond it is only stated that the several obligors, of whom the defendant was one, *became bound* unto the plaintiff, which must be taken to mean *jointly* bound: but supposing it meant *severally* bound, yet the bond being *joint* as well as *several* the memorial would be bad, according to *Willey v. Cawthorne* (a). If it be said that the defect is supplied by the subsequent part of the memorial, in which it is recited truly as a *joint and several* bond, and that a recital is the same as a precise allegation, according to the construction of the annuity act (17 *Geo.* 3. c. 26.) in *Sowerby v. Harris* (b), and *Hodges v. Money* (c), and *Cousins v. Thompson* (d); it may be answered, that such recital, if to be noticed at all, is contradictory to the memorial of the bond itself set forth, and shews such memorial on the face of it to be defective; or it leaves it at least ambiguous how the obligors may be sued, which requires explanation by matter dehors the memorial. But it is not even the recital of the party making the memorial, but a recital in another deed memorialized, which may not be correct. Nor does it even appear to be a recital of the *same* deed; for the words are, "also reciting that by a bond." [Lord *Ellenborough*. The memorial goes on, "*meaning the said bond before stated bearing even date therewith*;" which is a direct allegation that it is the

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(a) *Ante*, 1 vol. 398.(b) 4 *Term Rep.* 494.(c) 4 *Term Rep.* 500.(d) 6 *Term Rep.* 335.

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same bond before set forth.] But that allegation is at variance with the fact appearing on the face of the memorial, which shews that it cannot be the same without falsifying the memorial itself. At all events those cases only shew that a recital of the consideration of the annuity is sufficient within the statute, which merely requires that the memorial shall set forth the consideration of granting the annuity, and may therefore be well satisfied by a recital of such consideration: but that is very different from the express requisition of the act, that a memorial of every deed, bond, &c. shall be inrolled, &c. And so it was considered by the Court of C. B. in *Van Braam v. Isaacs* (a), who held that a memorial no otherwise noticing a bond, &c. given to secure an annuity than by way of recital, was bad. A fortiori, therefore, a previous false statement cannot make a recital more available.

Holroyd contra. The memorial must be taken altogether; and from the whole it appears sufficiently clear that the obligors in the bond of the 24th of December were jointly and severally bound. The recital in the second bond of the bond before stated is not inconsistent with the memorial before made of the same security. The memorial first states, that the obligors became bound, and then the subsequent recital shews in what way they became so, viz. jointly and severally. Though this is something more than recital; for the former bond, as recited in the second bond set forth in the memorial, is expressly alleged to mean the bond before stated of the same date, which is no part of the recital in the second bond. It is enough however if the fact appear by way of recital; and there can be no ground for the distinction set up between the manner of noticing the deeds and the consideration in the memorial; for both are equally required in the same clause of the statute: and the point was unnecessary to be decided in *Van Braam v. Isaacs*; for there was another decisive objection on which the Court there relied, namely, that all the witnesses to the deeds were not stated.

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Lord ELLENBOROUGH C. J. It is unnecessary to discuss the matter further, the cases cited being decisive that a fact appearing in the memorial by way of recital may be taken in aid to make that certain which would otherwise be left more at large. Our opinion does not contravene any of the cases referred to; for here all the deeds are stated, and nothing is stated untruly.

(a) 1 Bosc & Pull, 461.

It is first stated that the obligors *became bound*, not stating how ; it might be jointly, or severally, or both ; but according to the cases we may supply from a recital in another deed set forth in one part of the memorial what is defectively stated or left short in the statement of another part. This is very distinguishable from the case of *Willey v. Carutborne*, where it was stated that the obligors became *severally* bound, whereas they were bound both *jointly and severally*, which was holden bad ; for that was a deception in the memorial ; it imported that the parties were *only* bound *severally* and not jointly and severally, as *expressio unjus est exclusio alterius* ; but here the words are only *became bound*, which are open to either sense, and are explained by what follows to mean *jointly and severally* bound : and when it is stated that the bond so recited *meant the bond before stated*, &c. it brings the case within the rule of supplying a fact material to be stated from what is only recited in the memorial : and thereby what was left doubtful by one part is made clear by another. And if the consideration of granting the annuity may be collected from a recital in the deed set forth, it is as competent to us to collect from a recital of one bond in another that the first was a joint and several bond, which before was only described generally in the memorial.

GROSE J. The statute requires a memorial of every deed, bond, &c. ; and here the memorial does state the bond in question, but it does not state the whole of it at first : yet it does not allege any fact to mislead ; but the description of it being in some degree left short at first, we may look to other parts of the memorial : and we find that in noticing another bond in the memorial it is stated in the recital of such subsequent bond that the first was a joint and several obligation. That therefore, there being no appearance of deceit intended, may be taken to supply what was only left short in the description of the first bond before.

LAWRENCE J. Taking the whole memorial together it appears that the first bond mentioned was a joint and several bond. As it was first stated in the memorial, that stood uncertain ; it might have been joint and several, or joint only, or only severally ; but upon looking further we find it recited in a subsequent instrument as a joint and several bond, with an allegation that it is the same bond before mentioned ; that therefore is sufficient,

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LE BLANC J. Supposing the first part of the memorial contained a defective statement of the bond (which I am by no means prepared to say, supposing the question to have turned on that,) yet admitting it to be defective, it is supplied by the subsequent part. For the cases shew that the Court will look at a recital in the memorial; and in a recital in this memorial the Court see that which is not inconsistent with what goes before, but only that the bond in question was stated less accurately at first than in the subsequent part where it is stated by way of recital. Upon the whole therefore the Court see with sufficient certainty of what nature the bond was, that it was a joint and several bond.

Judgment for the Plaintiff.

Wednesday,
May 4th.

The KING against TOLLEY.

A conviction on the 4th sect. of the Stat. 5 Ann. c. 14. for keeping a dog and gun to kill game without being qualified, must be made within three months after the offence committed; and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad.

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A Conviction, returned into this court by certiorari, set forth, that on the 8th of September 42 Geo. 3. F. B. who prosecuted, &c. came before S. T. Esquire, a justice of peace, &c. and informed him, "that *within three months now last past*, viz. on the 7th of September, 42 Geo. 3. at the parish of D. in the county of Worcester, one John Tolley (the defendant) of E., &c. in the said county, farmer, being a person not then having lands, &c. (negating the several qualifications for killing game mentioned in the statute,) *nor then being gamekeeper of any lord, &c. of any manor, &c. duly constituted, &c. to kill game, nor then being truly a servant of any lord, &c. of any manor, nor then being immediately employed or appointed to kill game for the sole use or immediate benefit of any lord, &c., nor then being in any manner qualified to kill game or keep any dog or engine to kill game, &c. did keep and use a certain engine called a gun and three setting dogs to kill the game, in the said parish of D., &c., contrary to the form of the statute, whereby and by force of the statute he has forfeited 5l."* The conviction then set forth a summons of the defendant, and his appearance on the 11th of September, when he pleaded not guilty, and that a witness examined on the part of the informer proved the offence in the manner therein stated to have been committed on the 7th of September, 42 Geo. 3. Whereupon the defendant being called upon

upon by the said justice for his defence, he duly proved the execution of the following deputation by G. P., Esquire, lord of the manor of E. in the parish of D. aforesaid, and the certificate of the inrolment thereof with the clerk of the peace, &c. The deputation, dated in *September 1784*, was then set forth in the usual form, wherein the lord of the manor of E. appointed the defendant therein described as of E. aforesaid, *farmer*, to be his gamekeeper, with authority during the lord's pleasure to kill game, &c. upon his said manor of E. And it was admitted by the informer that the gun and dogs were kept and used within the manor. The defendant then also produced a game certificate with a three guineas stamp, but no certificate of his appointment of gamekeeper, nor any other proof of his qualification to kill game. It then stated, that at the instance of the informer and *with the consent of the defendant* the further hearing of the matter was *adjourned* to a future day to be named by the justice; "and that afterwards, on the 23d of *December 43 Geo. 3.* the defendant was again summoned to appear before the said justice on the 27th of the same *December* at, &c., on which day the defendant not appearing, and proof of the summons being made, &c. the justice adjudged that the defendant *within three months next before* the said information, viz. on 7th *September, 42 Geo. 3.* at, &c. being a person not having any lands, &c. (negating his qualifications) *not then being gamekeeper of any lord, &c.* (as before) *did keep and use* a certain engine called a gun and three setting dogs to kill the game, &c. And therefore the said justice *on this 27th of December, 43 Geo. 3.* at, &c. did convict the defendant of the offence aforesaid, &c. and adjudged that the defendant for his offence aforesaid had forfeited 5*l.* to be distributed, &c. In witness whereof the justice set his hand and seal at, &c. the 27th of *December, 43 Geo. 3.*" (Signed and sealed by the convicting magistrate.)

Peake for the defendant first objected to the conviction, that it proceeded upon the stat. 5 *Ann. c. 14.* for the penalty of 5*l.* for killing game without being duly qualified; whereas it appears upon the evidence that he was duly appointed a gamekeeper by the lord of the manor, as provided for by the same statute, *s. 4.* The Court then called upon

Wood in support of the conviction. If the defendant were not legally constituted a gamekeeper, then he cannot protect himself as such from the penalty of the statute of *Queen Anne.* Now the stat. 3 *Geo. 1. c. 11.* reciting the former law, "and that

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that under colour and pretence of the authority to kill game for the use of the lords, &c. of manors, it was become usual for lords, &c. of manors to grant deputations to the farmers, tenants, and occupiers of the lands lying within their manors to be gamekeepers, which practice was a great abuse of the said act, and tended to a destruction of the game; for remedy thereof enacts, that no lord, &c. of any manor shall appoint any person to be a gamekeeper, with power to kill game, unless such person be *qualified by law* so to do, or unless such person be truly and properly a servant to the said lord, &c. or be immediately employed or appointed to kill game for the sole use or immediate benefit of the said lord, &c., and not otherwise. And that no lord, &c. of a manor shall qualify any person, *not being qualified by the laws of this realm so to do*, to kill game, &c. or keep any greyhound, &c. or any other engine to kill game. And that any person not being qualified, &c. or not being truly and properly a servant of any lord, &c. (as before) who under colour or pretence of any deputation, &c. by any lord, &c. of a manor shall kill any game, &c. or keep or use any greyhound, &c. or any other engine to kill game, being thereof legally convicted, shall for every such offence incur such forfeitures, &c. as are appointed by the stats. 5 *Ann. c.* 14. and 9 *Ann. c.* 25.; such forfeitures to be recovered by such means, &c. and within such time, &c. as are prescribed by the said acts; any thing in the said acts or in any other law, &c. to the contrary notwithstanding." Now here there was no evidence that the defendant was duly qualified; and in the deputation itself he is described as *farmer*, and is one of the description of persons particularly pointed out by the latter statute, to whom a deputation shall not be granted. And the production of the three guinea certificate, which is a different certificate from what is required by the act of the 25 *Geo. 3. c.* 50. to be taken out by deputed gamekeepers, shews that he was not acting at the time under that deputation, but claiming to kill game in his own right: and he never took out a certificate as gamekeeper.

The Court intimated some doubt whether, though the defendant might not be a legal gamekeeper with power to kill game under the stat. 3 *Geo. 1.*, yet whether he might not be a legal gamekeeper to keep a dog or gun for that purpose within the stat. of *Anne*. Though Lord *Ellenborough* afterwards noticed the provision at the conclusion of the clause referred to in the stat. 3 *Geo. 1.* that such persons should incur such forfeitures as

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are appointed by the stat. of *Anne*. When *Grofe J.* observed, that by the 2d section of the stat. 5 *Ann. c. 14.* it is provided, that the conviction shall be made *within three months* after the offence committed; and here it appears to have been made long after that period; though the information is stated to have been made within that period.

Wood, (after some interval which he prayed to look into the act) observed, that the limitation of time was confined to the clause respecting higlers and others having or offering to sale, &c. game in their custody, who are liable to be convicted for every such offence in 5*l.*; and the words of the 2d clause limiting the time of prosecution are "provided that *such* conviction" (which must relate to a conviction for the offences before described) "be made within three months after *such* offence committed." But the offence for which the defendant is convicted arises out of the 4th clause of the statute, which has no limitation of time for the conviction, nor any direct words of reference to the former clause.

Peake, contra, said, that the 4th clause speaks of persons "convicted as *aforsaid*," which may as well refer to the manner and time of conviction mentioned in the antecedent clause as to any other matter in the same clause: but that at all events the doubt was gotten rid of by the subsequent statute of the 9 *Ann. c. 25.* which recites and makes perpetual the stat. 5 *Anne*, except as thereby altered; and then provides that no lord, &c. of a manor shall appoint above one person to be a gamekeeper within any one manor with power to kill game; and that the name of such person shall be entered with the clerk of the peace; and that in case any other gamekeeper whose name shall be not so entered, who shall not be otherwise qualified, &c. shall kill game, &c. he shall for every offence incur such forfeitures, &c. as are inflicted by the said recited act upon *biglers*, &c., "such forfeitures to be recovered by such means, and in such manner and form, and *within such time*, &c. as are prescribed by the said act."

The Court said, that this got rid of all doubt on the subject, and shewed that the conviction must be within three months after the offence committed: and here the magistrate had adjourned over that time before he made his conviction.

Conviction quashed.

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*Wednesday,
May 4th.*GARE *against* GAPPER, Clerk.GOULD *against* The same.

After sentence in the ecclesiastical court in a matter of tithe, where the question turned upon the construction of an act of parliament; upon a doubt raised whether that Court had not misconstrued the act, this Court directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question whether supposing the Court below to have misconstrued the act, a prohibition should go after sentence in a matter in which the Court below had original jurisdiction, or whether it were only a ground of appeal.

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UPON a rule calling on Mr. *Gapper* to shew cause why a prohibition should not issue to the consistory court of the archdeacon of *Wells*, to prohibit it from holding plea of the matters there depending between the parties; the proceedings appeared to be these:

Mr. *Gapper*, as rector of the parish of *High Ham* in the county of *Somerset*, libelled the respective plaintiffs in the court below for subtraction of tithes in the common form; and charged that the plaintiff *Gare*, in the years 1798, &c. occupied so many acres of meadow and pasture land, lately part of the open waste or common called *King's Sedgmoor*, and lately inclosed by virtue of an act of parliament, * *situate within the parish of High Ham aforesaid*, and the titheable parts thereof; in respect of which the tithe of hay and agistment tithe was demanded. To this the defendant by his answer stated, that by virtue of two acts of parliament, the 31 *Geo. 3. c. 91.* and 37 *Geo. 3. c. 16.* for draining and dividing the said moor or tract of waste land called *King's Sedgmoor*, the same was inclosed and allotted accordingly. That the said waste was anciently part of the possessions of the abbey of *Glastonbury*, and so continued till the dissolution of monasteries in the reign of *Hen. 8.*, and therefore exempt from tithe. That before the inclosure *King's Sedgmoor* was extra-parochial, and the tithes due, if at all, to the crown, whose right was saved by the said inclosure acts. The respondent further admitted, that in the year 1798 he occupied eight acres of meadow, lately part of *King's Sedgmoor*, from which he cut seven tons of hay; but denied that the same was previous to the passing of the said acts within the parish of *High Ham*; and as to the tithe of hay, he alleged a certain modus in the said parish. In reply Mr. *Gapper* by his personal answer admitted that the lands in question were part of *King's Sedgmoor*, but denied that they were extra-parochial; because the proprietors of lands in the several parishes near adjoining to *King's Sedgmoor* (of which the parish of *High Ham* is one) did, in respect of their lands, messuages, &c. in such several parishes, claim and had from time immemorial exercised certain rights of common of pasture appurtenant on *King's Sedgmoor*; wherefore it was part of the said several parishes,

ishes, though the boundaries of each were not certainly known. And that *King's Sedgmoor* is not mentioned in the act of the 31 Geo. 3. as extra-parochial, but is therein stated to be *in or near, or adjoining to certain parishes named, of * which High Ham is one*; and that the commissioners appointed by the said act did by their award allot and divide the said tract called *King's Sedgmoor*, unto and amongst each of the several parishes, &c. named, which were allowed to have rights of common appurtenant, &c. and it was in and by the said act directed, that the allotments should be made in proportion to the number of rights of common, &c. *and should for ever thereafter be deemed and taken to be part and parcel of the several parishes to which the same respectively should be assigned.* That the commissioners allotted 586 acres, part of *King's Sedgmoor*, unto and for the parish of *High Ham*. And that the proprietors of the several tenements in the said parish, in respect of the said allotments applied to parliament in the 37 Geo. 3. and obtained an act intitled, "for dividing, allotting, and inclosing the open or commonable lands and fields within the parish of *High Ham*," &c. under which last-mentioned act the spot in question was allotted to *Gare*, being part of the 586 acres before mentioned, and within the bounds of the said parish of *High Ham*. And that it was by the said last-mentioned act further provided, that the lands allotted by virtue of the same *should be held under and subject to the same charges, tenures, customs, rents, services, and incumbrances, as the several tenements in respect whereof such allotments were made, would have been subject to or liable to be charged with or affected by, in case that act had not been made.* That the tenements in respect whereof the said allotment was made to *Gare* have always paid tithe to the rector of *High Ham*. And the rector further submitted, that by virtue of the stat. 2 & 3 Ed. 6. c. 13. which enacts, that every person who shall have cattle titheable, going, feeding, and depasturing on any waste or common ground, *whereof the parish is not certainly known*, shall pay tithe for the increase of the cattle so going, &c. to the parson of the parish where the owner inhabits or dwells; the rector of *High Ham* was entitled to the tithe of the increase of the cattle, &c. The rector then denied *Gare's* allegation that the rector of *High Ham* had never received tithe arising on *King's Sedgmoor*, and alleged an instance of a composition received by the rector in 1785 of a parishioner in *High Ham*, for the tithe of a calf fallen on the same, and also that the occupiers of commonable tenements in

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High Ham have always paid tithe, or compounded for the increase and agistment of their commonable cattle, whether kept on their tenements or on *King's Sedgmoor*. He then admitted the modus set up by *Gare* as for certain cattle and lands, but denied it as to others, and particularly as to the lands allotted to *Gare* out of *King's Sedgmoor*. The proceedings then further set forth the depositions of witnesses, in which it appeared that within living memory *King's Sedgmoor* was considered as extra-parochial, and that certain persons, occupiers in *High Ham* long before the inclosure, had depastured cattle on *King's Sedgmoor*, and cut hay there, without paying or having any demand made on them for tithe: and speaking also as to the modus set up. The definitive sentence was then set forth, whereby it was decreed that the defendant below, *Gare*, in 1798 occupied eight acres of meadow land, *part of King's Sedgmoor, situate, lying, and being within the parish of High Ham, or the titheable places thereof, &c.*; and then it proceeded to adjudge the rector *1l. 1s.* for the tithe of hay cut therefrom; and so much more for agistment tithe of other part. The grounds stated by *Gare* for the prohibition prayed for were; that the trial of bounds of parishes, and of all prescriptions and customs, was of common law cognizance only, and not determinable by the ecclesiastical laws. 2. That *King's Sedgmoor*, lately inclosed, out of which the allotment in question was made, was not before the act of the 31 Geo. 3. within the parish of *High Ham* or the titheable places thereof, nor within the bounds or titheable places of any parish whatever, but wholly extra-parochial, and that in and by the said act there is a "*Saving to the king and his heirs, &c. of all such right, title, interest, claim, and demand whatsoever, as he had before the passing of the said act.*" And that certain moduses had been alleged and proved by him within the parish of *High Ham* in lieu of tithe; notwithstanding all which premises he had been sentenced to pay tithe, &c.

Gibbs, Lens Serjt., and Dampier shewed cause against the prohibition, and contended that however before sentence the Court would grant a prohibition upon a question of the boundary of a parish, or the construction of an act of parliament in issue in the ecclesiastical court; yet this application came too late after sentence. And they distinguished between this and cases where the ecclesiastical court had no original jurisdiction over the subject matter, appearing upon the face of the libel, in which case a prohibition would go even after sentence. But here it

was clear that the court below had jurisdiction of the original subject of complaint, namely, the subtraction of tithes: and the defendants below cannot by introducing incidental questions in their answers vary the original jurisdiction of the court; and having submitted at the time to have those matters tried and determined there, they cannot now object to the trial and sentence, when they find that the matter is decided against them. And they referred to *Full v. Hutchins* (a), *Juxon v. Byron* (b), *Symes v. Symes* (c), *Buggin v. Bennett* (d), *Blacquiére v. Hawkins* (e), *Dutens v. Robson* (f), and *Offley v. Whitehall* (g), as establishing the distinction contended for between a prohibition after sentence *pro defectu jurisdictionis* and such a prohibition *pro defectu triationis* only.

Erskine and *Burrough* denied that the Court would look only to the libel to see whether the ecclesiastical court had jurisdiction on the question decided; for otherwise it would be open to the plaintiff below to libel in the first instance for any matter within the jurisdiction, and in the subsequent proceedings to introduce any other matter of which the Court had no original jurisdiction to inquire. It is necessary therefore to look at the whole proceedings in order to see whether the court below were competent to decide upon the matters in issue between the parties. And here it appears that it was not so competent, the question being upon the construction of an act of parliament, whether such and such spots, which were before extra-judicial, were thereby placed within the boundary of a parish, concerning which the ecclesiastical court can have no jurisdiction? And upon the face of the proceedings it appears that there was no other evidence of the spots in question being within the parish of *Higb Ham*, except from what appears upon the face of the act of parliament. And the court below have misconstrued the act of parliament; for though the new inclosures are to be deemed parcels of the parishes to which they are respectively allotted, yet there is a saving of the rights of the crown; and as the king is entitled to the tithes of extra-parochial places, his right is not affected by the act, nor could the ecclesiastical court decide upon it. In 18 *Vin. Abr.* 53. tit. *Prohibition* M. a., it is said, "If a suit be in the spiritual court for tithes, where the

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(a) *Cowp.* 422.(b) 2 *Lew.* 64.(c) 2 *Burr.* 813.(d) 4 *Burr.* 2035.(e) *Dougl.* 378.(f) 1 *H. Blac.* 100.(g) *Bunb.* 17.

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question is, Whether the land be within a parish or out of it, and within a forest of the king; *after a sentence* for the plaintiff and an appeal by the defendant a prohibition shall be granted, *because it is utterly out of their jurisdiction to try the bounds of the parish; and also this concerns the king, &c.* *Frezewell v. Lord Darcey*, Hil. 9 Car. 1. So in *Foster v. Hide* (a), the spiritual court were prohibited from proceeding to try a question as to the bounds of a parish. In *Paxton v. Knight* (b), though the ecclesiastical court had original cognizance of the subject-matter, which was a seat in a church, yet the title of the plaintiff below being founded upon a *prescriptive* right, which was only triable at common law, this Court held itself bound to grant a prohibition even after sentence, and so it was done in *Eaton v. Ayliffe* (c). But even admitting that the party applying would come too late after sentence, if the question of boundary had been decided collaterally upon a mere issue of *fact*, whether parcel or no parcel of the parish; yet here the issue was brought forward upon a matter of law alleged, namely, on the construction of the act of parliament; there being no other evidence whereon to found the sentence of the ecclesiastical court. Judgment may be arrested on proceedings in the common law courts, though the illegal matter appear on the pleadings subsequent to the declaration or plea.

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The Court referred to the case of *Lord Camden v. Home* (d) in error, which afterwards went up to the House of Lords (e), where this question, as to the authority of the ecclesiastical court to construe an act of parliament, was much canvassed; and said they would look into the cases before they delivered their opinion. And on this day

Lord ELLENBOROUGH C. J. said; The case on the *Sedgmoor* act, which was before us the other day for a prohibition to the consistorial court of the Archdeacon of *Wells*, seems to involve a question of sufficiently general importance to make it fit for us to direct the plaintiff to declare in prohibition for the more solemn determination thereof. It involves a question of the construction of an act of parliament, under which certain parts of the waste lands of *King's Sedgmoor* have been allotted to particular parishes. And "whether, in case that act has been impro-

(a) 1 *Rol. Rep.* 332.(b) 1 *Burr.* 314, 315.(c) *Heil.* 94.(d) 4 *Term Rep.* 382,(e) 2 *H. Blac.* 533. 535.

perly construed, a prohibition after sentence should go," is a question upon which the authorities are not sufficiently settled to warrant us in treating it as a perfectly clear question. Lord C. J. *Eyre* in *Home v. Camden* (a) thought it a point which then required consideration. In *Rymer v. Atkins* (b), Lord *Loughborough* however lays it down as clear, that "if a court of appeals has misconstrued the act of parliament by which its jurisdiction is regulated, it would be a good ground of prohibition;" on an ancient and essential maxim of the common law, that all courts of special jurisdiction created by act of parliament must be "limited in the exercise of that jurisdiction by such construction as the courts of common law may give to the statutes;" because if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law." In *Lord Camden v. Home* (c) Mr. Justice *Buller* says, "If it were competent to us to decide on the second question, whether or not the Court of appeals had misconstrued the act of parliament, I should desire further time in order to look into the authorities." And he afterwards adds, "if the Court below have jurisdiction on the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal." And if that mistake be in the construction of an act of parliament, what is said by Lord *Vaughan* in *Hill v. Good* (d), respecting the distinction between statutes *directory to the ecclesiastical Court* and other statutes, deserves consideration. For these reasons, and that the rule may be laid down with more precision and certainty in what cases the Court will interfere by prohibition after sentence to correct the misconstruction of an act of parliament, supposing it to have been misconstrued, as well as to consider whether it has been misconstrued at all in the present instance, we think it fit to order the plaintiff to declare in prohibition.

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(a) 2 *H. Blac.* 535.(b) 1 *H. Blac.* 187.(c) 4 *Term Rep.* 396.(d) *Vaughan*, 301.

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*Wednesday,
May 4th.*

An action lies by the indorsee against the indorser upon a bill of exchange immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed.

BALLINGALLS and Another against ARCHIBALD GLOSTER.

THE plaintiffs, as indorseees of a bill of exchange, declared that one *John Gloster* on the 26th of *March* 1802, at the island of *St. Vincent* in parts beyond seas, according to the custom of merchants drew a bill of exchange for 250*l.* of that date, directed to one *J. Jackson*, and required him at 90 days sight to pay the same to the order of the defendant; that the defendant afterwards and before payment of the same indorsed the bill to the plaintiffs or their order. That they afterwards, on the 10th of *August*, presented the bill for acceptance to *J. Jackson*, who refused to accept the same; and thereupon the plaintiffs caused it to be duly protested for non-acceptance: of which premises the defendant had notice, and according to the custom of merchants became liable to pay to the plaintiffs the sum of money in the bill mentioned when he should be requested; and being so liable he promised to pay, &c.

The facts appearing in evidence before Lord *Ellenborough* C. J. at *Guildhall* were, that the bill in question was passed to the plaintiff's agent at *Trinidad* by the original drawer, with the indorsement of the defendant upon it, for a valuable consideration: that the bill was presented and protested for non-acceptance on the 10th of *August*; after which, on the 30th of *October*, this action was commenced before the bill fell due, which was not till the 11th of *November*. And the only question was, Whether upon non-acceptance of a bill the indorsee has a right immediately to sue the indorser, as a new drawer, without waiting for the time when the bill becomes due? it having been decided in *Milford v. Mayor* (a) that such action lies against the original drawer. The plaintiffs at the trial obtained a verdict, with leave to the defendant to move to set it aside. A rule nisi having been accordingly obtained for this purpose,

Erykine and *C. Warren*, who were to have shewn cause, were stopped by the Court.

Gibbs and *Consl*, in support of the rule, endeavoured to distinguish this from the case of *Milford v. Mayor*; because of the privity between the original drawer and the person on whom the bill is drawn, who is presumed to be his correspondent, having

(a) *Dougl.* 54.

property of the drawer's in his hands, or at least willing to give him credit; for whose due acceptance thereof the drawer may well be supposed to pledge himself as an inducement for a third person to take his bill instead of payment: there if the condition fail by the non-acceptance of the drawee, the holder may fairly resort to the drawer immediately. But as between indorser and indorsee there is no such implied understanding, the original contract between them is with relation to the time mentioned in the bill, before which no debt arises.

LORD ELLENBOROUGH C. J. There is no distinguishing the case of an indorser from that of the drawer, it having been long ago decided that every indorser is in the nature of a new drawer (*a*), every indorsement as a new bill, and that the indorser stands as to his indorsee in the law merchant the same as the drawer. The point ruled in *Milford v. Mayor* was not then new. In *Bright v. Purrier* (*b*), where the same question occurred, Lord Mansfield said that the law was clearly so settled. Those indeed were actions against the drawers; but though this particular case of an action against the indorser has not occurred in the books, yet when it has been laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter. And in a late case tried before me at *Guildhall* it appeared to be the universally received law merchant on the continent, that an indorser was liable immediately on the non-acceptance of the drawee.

GROSE J. of the same opinion.

LAWRENCE J. In *Heylin v. Adamson* (*c*), Lord Mansfield said, when a bill of exchange is indorsed "as between the indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer."

LE BLANC J. There is no hardship on the indorser; for he must be presumed to know the person from whom he receives the bill, and on whose security he must rely.

Rule discharged.

(*a*) Vide *Smallwood v. Vernon*, 1 Str. 479. *Hodges v. Steward*, 1 Salk. 125. *Anon. Skin.* 343. and *Macarty v. Barrow*, as cited in 3 Will. 16.

(*b*) *London*, Sittings after Trin. 1765. Bull. N. P. 269.

(*c*) 2 Burr. 674.

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Friday,
May 6th.

J. STRANGE, J. DASHWOOD, G. T. STEWARD, J. AGNEW, and
W. M'GEORGE, surviving Partners of JAMES WALWYN, de-
ceased, against LEE.

Whereas bond by *A.*, reciting that *B.* intended to open a banking account with *C.*, *D.*, and *E.*, as his bankers, was conditioned for payment to them of all sums from time to time advanced to *B.* at the banking house of *C.*, *D.*, and *E.*: held that on *C.*'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that *B.*, who was indebted to the house at *C.*'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in *C.*'s lifetime, *A.* was wholly discharged from his obligation.

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IN debt on bond, the plaintiffs declared as surviving partners of *James Walwyn*, to whom in his lifetime with themselves as bankers and partners, on the 3d of *March* 1800, the defendant became bound in the sum of 999^l. The defendant cravedoyer of the bond, which was a joint and several bond by himself and one *Benjamin Blyth*; and of the condition; which, reciting "that *Blyth* intended forthwith to open an account with *Walwyn*, *Strange*, and the other plaintiffs, as his bankers, and that in the course of their dealings and transactions he might become indebted to them for money advanced on bills, bonds, notes, or other securities, or upon drafts or notes drawn or issued by him, *Blyth*, upon or made payable at the banking-house of the said *Walwyn*, *Strange*, &c., and for interest and commission, &c., witnessed, that if the defendant and *Blyth*, and their or either of their executors, &c. should from time to time thereafter on demand pay to the said *Walwyn*, *Strange*, &c. or either of them, all and every sums of money which should or might at any time or times thereafter become due to them from *Blyth* for money advanced to him or for his use upon any bills &c. drawn or issued by *Blyth* upon or made payable at the banking-house of *Walwyn*, *Strange*, &c. or for interest on the money advanced by them as aforesaid from the times of advancing the same respectively until re-payment thereof, or for commission, &c. or otherwise howsoever; then the obligation * to be void, &c. The defendant then pleaded, 1. Non est factum. 2dly, Performance generally in the words of the condition; i. e. payment to *Walwyn*, *Strange*, &c. of all sums which became due to them from *Blyth*. 3dly, That *Walwyn*, *Strange*, and the other plaintiffs, before and on the 3d of *March* 1800, carried on the trade and business of bankers, as partners on their own account and in their own names only, and not in partnership with any other, and that they so continued to carry on the same till the 9th of *October* following, when *Walwyn* died. That at the death of *Walwyn* there was not due from *Blyth* to *Walwyn*, *Strange*, &c. any money for money advanced to him or for his use upon any bills,

&c.

&c. drawn or issued by *Blyth* upon or made payable at the banking-house of *Walwyn, Strange, &c.* or for interest, &c. or commission, &c. or otherwise howsoever.

The replication joined issue on the first plea, and as to the second, protesting that *Blyth* had not paid to *Walwyn, Strange, &c.* the sums which from time to time became due to them, &c., assigned for breaches, 1st, that after the making of the writing obligatory, and in the lifetime of *Walwyn*, and before this action commenced, viz. on the 19th of *April* 1800, and on divers other days between that and the 19th of *October* 1800, *Walwyn, Strange*, and the other plaintiffs, in the lifetime of *Walwyn* advanced to *Blyth* upon his bills, &c. payable at their banking-house, &c. 7000*l.*; and that *Blyth* was further indebted to *Walwyn, Strange, &c.* in the lifetime of *Walwyn*, in 250*l.* for interest and commission, &c.; which sums *Blyth* did not on demand pay to *Walwyn, Strange, &c.* in the lifetime of *Walwyn*, or since his death to the plaintiffs, although demanded, &c. 2dly, That after the making of the writing obligatory, and after the death of *Walwyn*, viz. on the several days between the 10th of *October* 1800 and the 31st of *December* 1801, the plaintiffs, survivors as aforesaid, advanced and paid to *Blyth* and for his use, upon divers bills and notes issued by *Blyth* upon and made payable at the banking-house of the plaintiffs *Strange, &c.* survivors as aforesaid, 6000*l.*; and that after there became due from *Blyth* on the several days, &c. between the 10th of *October* 1800 and the 31st of *December* 1801 to the plaintiffs *Strange, &c.* a further sum of 200*l.* for the interest of money advanced by them as last aforesaid, and for commission for transacting business, &c.; which sums *Blyth* did not on demand pay to the said plaintiffs. Replication as to the third plea, that at the time of *Walwyn's* death there was due and owing from *Blyth* to *Walwyn, Strange, &c.* in the lifetime of *Walwyn*, 6000*l.* as well for money advanced to *Blyth* upon certain bills, &c. made payable at the banking-house of *Walwyn, Strange, &c.* as for interest thereon and commission, &c. On all these issues were taken and joined.

The cause was tried at the Sittings after *Michaelmas* term before Lord *Ellenborough* C. J., when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case.

At the time of entering into the above bond, the obligees carried on in partnership the business of bankers in *New Bond street*,
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under the firm of *Walwyn* and Co. *Blyth* immediately after the execution of the bond opened an account with the obligees at their banking house, and drew bills, notes, and drafts payable there, which were regularly accepted and paid, as well in the lifetime of *James Walwyn*, as after his death on the change of the firm after-mentioned, until *Blyth's* becoming a bankrupt, which was in *April* 1801. On the 9th of *October* 1800, *Walwyn*, one of the obligees, died, at which time there was a balance due from *Benjamin Blyth* to the house of 21*l.* for bills paid and monies advanced pursuant to the condition of the bond. On the 2th of *October*, *George Peacocke* came into the partnership in the room of *Walwyn*, deceased, and the business was then carried on under the firm of *Strange, Dasbwood, and Co.* On the same 24th of *October* 1800, *William Macgeorge*, one of the original obligees of the bond, went out of the partnership; on which occasion notice was advertised in the *London Gazette* "that the partnership between *J. Strange, J. Dasbwood, G. T. Steward, J. Agnew, and W. Macgeorge, of New Bond street, &c.* bankers, (carrying on business under the firm of *Walwyn, Strange, Dasbwood, Steward, Agnew, and Macgeorge.*) was, on the 24th of *October* 1800, dissolved by mutual consent, so far as concerns the said *W. Macgeorge*, and that the business from thenceforth would be carried on by the said Messrs. *Strange, Dasbwood, Steward, and Agnew*" (signed amongst others by *J. W.* as administrator to *J. Walwyn*, deceased). After this advertisement the business was continued under the last mentioned firm of *Strange, Dasbwood, and Co.* until the bankruptcy of *Blyth*; and *W. Macgeorge* quitting the partnership, there was a balance due by *Blyth* to the partnership of 21*l.* 12*s.* 4*d.* After the death of *Walwyn* the survivors continued to accept bills, pay drafts, &c. made payable at the house in *Bond-street*, in the same manner as had been done in the lifetime of *Walwyn*, and *Blyth* also made payments into the house at different times; but on the bankruptcy of *Blyth* he was indebted to the house in 158*l.* on balance of accounts, including the sum of 21*l.* due at the death of *Walwyn*. The bankers always sent down to *Blyth* the bankrupt a monthly statement of the account between them, striking the balance, which was carried to the next monthly account. This account was styled "Dr. and Cr. with *Walwyn* and Co. - *B. Blyth*," in *Walwyn's* lifetime. After his death it was styled "Dr. and Cr. with *Strange, Dasbwood, and Co.*" In the monthly account to the 30th of *October* 1800, in which

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Walwyn died, notwithstanding the balance appearing at the death of *Walwyn* of 219*l.* due to the house, there appears to be a balance of 87*l.* 12*s.* due to *Blyth*. In *December* following, in the monthly account the balance was in favour of *Blyth* 27*l.* Default having been made in payment of *Blyth*'s deficiency to the extent of the penalty of the bond, the above-mentioned action of debt on bond was brought by the plaintiffs as the surviving partners of *Walwyn* against the defendant *Lee*. The jury found a verdict for the plaintiffs for 999*l.*, the amount of the penalty of the bond, with one shilling damages, and damages for the breach of the condition 999*l.*, or 219*l.*, or any other sum according to the opinion of the Court; subj-ct to the opinion of the Court on the following points; 1st, Whether the plaintiffs are entitled to recover the sum of 999*l.* as damages for the breach of the covenant, or 219*l.* only, the sum due at the time of the death of *J. Walwyn*? 2dly, Whether this last sum has been paid by subsequent payments made to the partnership of *Strange, Dabwood, and Co.*?

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With respect to the last of these questions, which was discussed at the bar in the course of the argument upon observations thrown out by some of the bench, it being more a matter of account than of law, it was finally resolved by the Court, that taking the rest to be made in the account, so far as respects the defendant, at the death of *Walwyn*, it appeared that all the money before that time advanced by the banking-house to *Blyth* was repaid by him; for after *Walwyn*'s death the payments made by *Blyth* were applied to the old account, so as to turn the balance in favour of *Blyth* in the same month of *October* in which *Walwyn* died, and down to the *December* following.

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Espinasse for the plaintiff, upon the first general question, contended that the defendant was liable upon his bond, notwithstanding the change of partners in the house, to which the security was originally given, by the death of one partner and the introduction of another. The obligation was meant to be given to the parties, not personally or individually, but as a house of trade, without regard to the particular persons who might from time to time constitute the partnership. This being the manifest intention of the parties, the Court will give effect to it without looking critically to the mere words of the obligation, in which the individuals are merely named as descriptive of the banking-house;

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house; and he cited *Co. Lit. f. 282.*; *Bache v. Proffor* (a); *Teat's case* (b); and particularly *Barclay v. Lucas* (c), where a bond for the fidelity of a clerk, who was taken into the service of the obligees as a clerk in their shop and counting-house, was holden not to be discharged by the obligees taking another partner into their house: and that the obligees might recover from the surety on his bond money received by the clerk after such change of partners; such bond being meant only as a security to the house of the obligees.

Moore contra was stopped by the Court.

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Lord ELLENBOROUGH C. J. The Court will no doubt construe the words of the obligation according to the intent of the parties to be collected from them: but the question is, what that intent was? The defendant's obligation is to pay all sums due to them, on account of their advances to *Blyth*. Now who are "them" but the persons before named, amongst whom is *James Walwyn*, who then constituted the banking-house, and with whom the defendant contracted? The words will admit of no other meaning. And indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters therefore of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement. But with a small shade of difference in *Barclay v. Lucas*, where some expressions occur that may perhaps be difficult to reconcile with the other authorities, I consider this question concluded by the cases of *Arlington v. Merrick* (d), *Wright v. Ruffel* (e), and *Barker v. Parker* (f). It may be observed however, that in *Barclay v. Lucas* the words were different from the present case:

(a) *Dougl.* 382. (b) *Cro. Eliz.* 7.

(c) *M.* 24 *Geo.* 3. *B. R.* cited in *Barker v. Parker*, 1 *Term Rep.* 291.

(d) 2 *Saund.* 412. (e) 2 *Blac.* 934. and 3 *Wils.* 532.

(f) 1 *Term Rep.* 287. and vide *Myers v. Edge*, 7 *Term Rep.* 254.
the

the clerk was to be taken into *the service* of the obligees as a clerk in their shop and counting house, which might * be supposed to mean the same house, however the individual partners might change. But without considering whether that were the true construction of those words, it is enough to say that there are no such words here. But we are now desired to construe an obligation to be answerable for money due to *them* (certain partners having been before named) to mean money due to *any part of them*, a construction which would be contrary to the words of the instrument: what is contended for is, to make this a bond to the persons then constituting the banking-house and their successors, which cannot be admitted.

LAWRENCE J. A bond may be drawn with the condition now insisted on in argument by the plaintiff's counsel, for the obligor to be answerable not only to the present but to all future partners in the house; but that has not been done here.

Per Curiam,

Postea to the Defendant.

HOWES *against* BRUSHFIELD.

Friday
May 6th.

IN covenant, the plaintiff declared on an indenture of release of three parts, made the 14th of *December* 1799, between the defendant of the first part, the plaintiff of the second part, and one *J. H.* of the third part, whereby the defendant bargained and sold and granted to the plaintiff certain lands called *Leymouth* in the parish of *Westham* in the county of *Essex*, to hold to him and his heirs, &c., and the defendant thereby covenanted with * the plaintiff that notwithstanding any act, deed, matter, or thing whatsoever by him the said defendant made, done, executed, committed, or willingly *suffered* to the contrary, he the defendant, at the time of the date and execution of the said indenture, was seised of or well and sufficiently entitled to the premises thereby granted, &c., of a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simple, without any condition, trust, limitation, power of revocation, or appointment, use or uses, or any contingency, or *other act*, deed, matter, restraint,

The seller covenants to the purchase of an estate hat he shall enjoy and receive the rents, &c. without any action, &c. or interruption by the seller or those claiming from him, or by, through, or with his or their acts, means, default, &c.; held that a breach was well assigned

in respect of certain quitrents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises

or [*492]

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—
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or thing whatsoever, whereby such estate or interest could, should, or might be altered, changed, *charged*, revoked, defeated, evicted, made void, *affected*, *incumbered*, or determined, in anywise howsoever, except as thereafter excepted. And that notwithstanding any such act, deed, matter, or thing, as thereinbefore expressed, he the defendant, at the date and execution of the said indenture, had in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, convey, and assure the said lands, &c. thereby granted, &c. unto the plaintiff and his heirs, &c. according to the true intent and meaning of the said indenture of release." It also contained the usual covenant for entry and quiet enjoyment, and for receipt of the rents, issues, and profits, &c. without any action, suit, proceeding, denial, eviction, molestation, or interruption whatsoever, of, from, or by the said defendant or his heirs, *or any other person whomsoever legally or equitably claiming or to claim any estate, right, title, or interest whatsoever of, in, or to the said premises, &c. by, from, under, or in trust for him, them, or any of them, or by, through, or with his, their, or any of their acts, means, DEFAULT, privity, consent, or procurement.* And that freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the defendant, his heirs, &c. at all time thereafter well and effectually saved, defended, and *kept indemnified* of, from, and against all other grants, bargains, sales, contracts, agreements, leases, &c. uses, trusts, wills, devises, intails, recognizances, judgments, extents, executions, forfeitures, *rents, arrears of rent*, rents charge, debts, and of, from, and against all *other estates*, rights, titles, interests, *acts, charges, and incumbrances* whatsoever at any time theretofore entered into, had, made, done, executed, committed, created, occasioned, or *suffered*, by the defendant, or any other person whomsoever legally or equitably claiming by, from, under, or in trust for him, or by, or through, or with his or their acts, means, *defaults*, privity, consent, or procurement; *except* only certain *quitrents* from thenceforth to become due and payable to the lord of the manor, &c. for and in respect of the said lands, &c., and also fines and charges under the commissioners of sewers, &c. The declaration then stated the entry and seisin of the plaintiff; and assigned for breach, that before and at the time of making the said indenture certain arrears of rent, viz. 3*l.* 13*s.* 1*d.* of quitrent for five years for certain part of the premises named, were in arrear to the lord of the manor, &c., and certain

certain other charges and incumbrances for suits of court, and acquittances, &c. amounting altogether to 3*l.* 19*s.* 11*d.* at the time of making the said indenture were due and in arrear to the said lord, &c. which the plaintiff was compelled to pay in order to save his goods from being distrained upon, and did pay the same to the said lord, &c. who at the time of making the said indenture and of such payment had lawful right, &c. and claimed the same. There was another breach assigned on the title, which was abandoned. To this the defendant demurred generally.

Marryat in support of the demurrer. It is not shewn that the rent in arrear was an incumbrance made in the defendant's own time, and he only covenants against his own acts. The covenant is against any action, &c. or molestation "*of, from, or by the said defendant or his heirs, or any other person whomsoever legally or equitably claiming, &c. any estate, right, title, or interest in the premises by, from, under, or in trust for him, &c., or by, through, or with his, their, or any of their acts, means, default, privity, consent, or procurement,*" &c. Then the covenant to indemnify against arrears of rent, &c. must be confined by the following words to such as were "*created, occasioned, or suffered by the defendant or any other person claiming under or in trust for him,*" &c. [Lord *Ellenborough*. He is to indemnify against all *wills and devises*, which must mean the acts of other persons.] Those may be the acts of persons in trust for the defendant. The particularity of the covenant, which was evidently intended to be a qualified one, is now attempted to be converted into an unqualified covenant against any paramount title. If the defendant, knowing of an incumbrance which did not arise from his own act, concealed it from the purchaser, an action of deceit would lie; but that cannot affect this question, which turns on a covenant by the defendant against his own acts, there being no averment that the rent in arrear accrued while he held the estate. [Lord *Ellenborough*. He covenants against incumbrances by his *default*. Now if rent were in arrear before, which remained so while he was tenant, would it not be *his default* that it was left unpaid?] That could not be deemed a *default* of *his*, which must be understood of a *personal* default, unless it had accrued in his time, and he were personally answerable for it, which he would not be after he had parted with the land: and the

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breach is not alleged in that manner; it is not said that it was in arrear by his default.

LORD ELLENBOROUGH C. J. If it were in arrear in his lifetime, it is a consequence of law that it was by *his default*; that is, by *his default*, in respect of the party with whom he covenants to leave the estate unincumbered. He has left it with an incumbrance which he ought to have discharged.

Per Curiam,

Judgment for the Plaintiff on the first breach, and for the Defendant on the other.

Friday,
May 6th.

GOOD against WATKINS.

Under the statute 8 & 9 W. 3. c. 11. s. 4. it is discretionary in the Judge before whom the trial is had to certify or not, according as it appears to him under the circumstances proved, that the trespass was wilful and malicious. And the Judge having declined to certify in a case where notice was given by the wife of the plaintiff to the defend-

TO trespass for breaking and entering the plaintiff's close called *Headacre*, and two other closes by name, and for treading down the grass with carts and cattle, &c., the defendant as to all the closes but *Headacre* pleaded several rights of common on which issues were taken, and also on trespasses newly assigned: and as to the trespass in *Headacre* he went to trial on the general issue. At the trial before *Le Blanc J.* at the last Summer assizes at *Oxford*, all the issues except that on the trespass in *Headacre* were found for the defendant; and as to that * the evidence was, that on the 22d of *December 1800*, the defendant, who was a cripple, came in a cart attended by several other persons to the spot where these closes were situated, and after turning in some sheep which he had with him into the two other closes in which he claimed the rights of common, which were found for him, he entered *Headacre* in his cart, when he was told by the plaintiff's wife, who happened to be present, (the plaintiff himself being absent,) that there was no road there; upon which the defendant said he would make one; and after staying there some little time looking at his sheep in the other closes, went out at another gate than that through which he entered. Upon proof of this trespass, to which there

defendant not to enter the locus in quo in his cart, there being no road there; notwithstanding which the defendant persisted in going on for the purpose of viewing more conveniently the turning in of some cattle in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant on a justification pleaded; the Court refused to interfere. [*496]

was no answer, the plaintiff obtained a verdict with 1s. damages; and application was thereupon made at the trial to the learned Judge to *certify* under the stat. 8 & 9 W. 3. c. 11. s. 4. that the trespass was wilful and malicious, being after notice; which he declined to do; not thinking it a proper case for such a certificate, unless it were compulsory upon him by the statute: but said, that if upon the received construction of the statute, which was pressed upon him by the plaintiff's counsel, he was holden bound to certify after notice, and had no discretion, he should be ready to grant it afterwards. In *Michaelmas* term last a rule was obtained, calling on the plaintiff to shew cause why "Mr. Justice *Le Blanc* should not certify on the record that the trespass proved to have been committed by the defendant in going over *Headacre* with a cart and horse, after notice that the same was not a cartway, was wilful and malicious."

Milles now shewed cause, stating that after the case of *Reynolds v. Edwards* (a), he would not dispute but that if after notice not to come upon another's ground the party committed a wilful trespass, the Judge was bound to certify: but here he contended that neither the notice was regular, nor the trespass wilful and malicious, in the sense intended by the statute; for the notice must be given by the tenant of the land; whereas here it was given by his wife, without any evidence of her having acted by his authority; and none could be presumed upon such an occasion, especially where the trespass could not have been foreseen. For as she could not have licensed the defendant without the privity of her husband, so neither could she by her single forbidding make him a wilful and malicious trespasser. Then the trespass in *Headacre* was merely accidental, and on the sudden, in the assertion of another right, in which it appears that he was justified; and on that ground also it was not a wilful and malicious trespass within the statute.

Williams Serjt. upon moving for the rule, and *Manley* in support of it now, relied upon *Swinerton v. Jervis*, E. 22 Geo. 3. C. B., and other cases cited in *Reynolds v. Edwards* (b), to shew that if the trespass were committed after notice, it is wilful, and the Judge is bound to certify by the statute. And they also referred to a case of *Rudge v. Pond*, *Hersford* Spring assizes 1791, before *Buller* J., where in trespass quare clausum fregit, it appeared that the defendant had asked leave of the

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(a) 6 Term Rep. 11.

(b) 6 Term Rep 11.

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plaintiff to go over the locus in quo, which the latter refusing, the defendant said he would then take leave, and accordingly went over it: and on a verdict for the plaintiff for 6*d.*, the learned Judge held himself bound to certify. And so he did in another case of *Davenport v. Humphreys*, at *Stafford* in 1784, upon a trespass proved after notice to refrain. Now here there was notice given on the spot by the wife, after which the defendant persisted in going through the close, and declared that he would make a road there. And the wife must be taken to have acted with the authority of her husband, he having recognized her act by bringing the action.

Lord ELLENBOROUGH C. J. To be sure there must be some evidence that the wife had authority to give such a notice, which is to make the party a wilful and malicious trespasser. It might perhaps have been sufficient to shew that she had the general management of the farm: but the mere bringing of the action is no confirmation of such an authority; for it concludes no more than that the plaintiff meant to insist on his damage for the common trespass. Non constat from thence, that the plaintiff knew more of the transaction than as to the fact of the trespass. If indeed it had been necessary for the maintenance of the action that the trespass should have been wilful and malicious, the bringing it might have afforded some presumption that he adopted his wife's act at the time and made it his own. In the case of *Swinnerton v. Jervis* the notice not to come on the manor, after which the trespass insisted on as wilful and malicious was committed, was given by the plaintiff's gamekeeper, who might well be presumed to have acted by the orders of the plaintiff, it being within the general scope of his authority to warn persons off the manor who had no authority to sport there. It also appears to me that the rule itself is improperly conceived. The act of granting a certificate in any case is to be done by the Judge alone before whom the trial is had: a rule therefore calling upon a party to shew cause why the Judge should not be compelled to certify is not only disrespectful and improper in the terms of it, but inefficacious in itself; and I must object to making any rule which we have no means of compelling the execution of. If there be any method of compelling the Judge to grant a certificate, it can only be by mandamus, though I do not mean to say that it can be done at all.

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GROSE J. I well remember the case of *Swinerton v. Jervis*, in which I was counsel; and it would never have been conceived that such a rule as the present could have been made had it not been the express desire of Mr. Justice *Nares*, before whom the cause was tried, that the question whether or not he were bound to certify a trespass as wilful, committed after notice not to come upon the plaintiff's land, should be brought before the Court in that shape. But I do not think that it is compulsory at all on the Judge to certify; but the act of parliament meant to leave it altogether to his discretion to certify or not, according as it appeared to him on the trial, that the trespass was or was not wilful and malicious.

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LAWRENCE J. The statute meant to leave it to the discretion of the Judge who is to certify whether or not the trespass were wilful and malicious. If he upon view of all the circumstances proved, think that it was wilful and malicious within the statute, he will certify accordingly: but the legislature meant to leave it to him to determine whether it were so proved or not. And if he do not think it a case proper for him to certify, I have no idea that he can be enforced to do so either by such a rule as the present, or by mandamus, or in any other manner.

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LE BLANC J. I would not have it understood that I make any complaint of the party who applied for the rule in this case. I was indeed of opinion at the trial that this was not a proper case for me to certify if I had any discretion to exercise upon the subject; but I also said, on being pressed with the authority of the cases cited, that if upon further examination it should be found that I was compelled to do so after the notice proved, I should be ready to certify afterwards.

Rule discharged.

CHAWNER *against* WHALEY.

Friday,
May 6th.

A Rule was obtained calling upon the plaintiff to shew cause why the bond and warrant of attorney to confess judgment, given for securing an annuity, and the judgment entered certain bonds whereby the grantor for whose life the annuity was granted bound himself to pay the grantee a certain sum if he went abroad in a military capacity during three several years following the grant of the annuity; held that the annuity was thereby vacated; and this Court thereupon set aside the warrant of attorney and judgment given amongst other instruments for securing the annuity.

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thereon, should not be set aside, and the several deeds, &c. for securing the annuity be delivered up to be cancelled.

It appeared that in 1794 the defendant contracted to grant to the plaintiff an annuity of 45*l.* 6*s.* 8*d.* for the term of 100 years, if the defendant should so long live, to be secured by the defendant and guaranteed by J. H. and W. H. by certain bonds and an indenture for the price of 220*l.* In pursuance of which agreement the plaintiff paid the last mentioned sum on the 30th of *October* 1794, and on the same day the defendant executed to Chawner a bond for 10,000*l.*, conditioned to be void on payment of the annuity, and two warrants of attorney for confessing judgment respectively in this court and in the court of Exchequer in *Ireland*; and the two sureties executed similar bonds and warrants of attorney. And for further assurance the defendant also executed an indenture of the same date, whereby he assigned to the plaintiff a certain annuity devised to him, secured upon certain lands in *Ireland*, and also certain other lands there for a long term of years determinable on his (the defendant's) life. A memorial of all these several instruments was duly registered pursuant to the annuity act 17 *Geo.* 3. c. 26. But the objection arose upon the entire omission in the memorial of three several bonds executed by the defendant, at the same time, and bearing even date with the other deeds, which bonds were to the following purport. By the first the defendant bound himself to the plaintiff in 260*l.*; and the condition reciting the agreement for the annuity, and that in pursuance and part performance of the same on the part of the defendant he had executed the first mentioned bond to the plaintiff, and in further performance of the same he and the sureties named had executed the other instruments mentioned; and reciting further that "whereas upon the treaty for the purchase of the said annuity it was agreed that in case the defendant should go abroad in a military capacity at any time during the period of three years from the date of this bond that he, the defendant, should forfeit and pay for any or either of those years he should go abroad as aforesaid the sum of 130*l.* to the plaintiff as a compensation to him for the loss he might sustain by his the defendant's going abroad in the said capacity, in as much as no office would insure the lives of persons going abroad in a military capacity: and whereas, in pursuance of the said agreement on the part of the defendant, and for securing the payment of the said 130*l.* in case he should go abroad

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in any of the three years in a military capacity the defendant had agreed to enter into three several bonds to the plaintiff in 260*l.* each, to be void respectively on payment by him, the defendant, to the plaintiff (if he the defendant should go abroad in such capacity as aforesaid) of 130*l.*: it therefore witnessed that if the defendant should pay to the plaintiff 130*l.* if he the defendant should go abroad in a military capacity between the 30th of *October* 1794 and the 30th of *October* 1795, within a month after, &c. then the obligation to be void." The other two bonds were in the same form, *mutatis mutandis*, for the two successive years respectively.

Erskine and *Marryat* shewed cause. The annuity act only requires "a memorial of every deed, &c. whereby any annuity shall be granted." Now the bonds in question were not made for the grant or security of the annuity, but for a collateral purpose. The object of the legislature in requiring the memorial was for the benefit of the grantor, in order that it might more easily appear what was the true consideration for granting the annuity, and that the grantor had had the benefit of it. But these bonds were given with another view, namely, to enable the grantee to contract with third persons to more advantage in a certain event which was in the choice of the grantor. [*Lord Ellenborough*. Is not such a bond as much a part of the consideration for granting the annuity, (which must be shewn by the memorial) as a power of redemption? and such a power, whether reserved by the same instrument granting the annuity or any other, must be memorialized. Here the grantee is to pay a certain sum in the first instance as the price of the annuity, and if the grantor go abroad within the three years, he is to return so much of the consideration money as amounts to the penalty of the bond, and is therefore in effect to receive so much less for the grant of the annuity.] But this is no benefit to the grantor, like a clause of redemption, and therefore not within the spirit of the act. It was merely intended as a compensation to the grantee, if by the voluntary act of the grantor in going abroad in a military capacity subsequent to the grant of the annuity he thereby put the grantee in a worse condition for insuring his life than he was at the time the bargain was made for granting the annuity in consideration of a certain adequate sum. It might have been an inducement

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to the grantee to buy the annuity, but it forms no part of the consideration paid for it in money, which is the only sort of consideration required by the act to be shewn, as may be collected from the 3d section of the act. At all events they contended that the rule could not be made absolute to the full extent of directing *all* the deeds to be delivered up to be cancelled, but only to the setting aside the warrant of attorney and judgment: and they cited Lord *Loughborough's* opinion in the Duke of *Bolton v. Williams (a)*, correcting the case *Ex parte Chester (b)*.

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LORD ELLENBOROUGH C. J. The bonds in question are certainly part of the assurance whereby the grant of the annuity may be evidenced. What is the case in effect but this? The grantor, in consideration of a certain sum, agrees to pay an annuity of 45*l.* 6*s.* 8*d.* for his life, if he do not go abroad in a military capacity from *October* 1794 to *October* 1797; and if he should so go abroad, he agrees to pay the grantee 58*l.* 6*s.* 8*d.* during each of the three years he should be abroad. The annuity is therefore void, inasmuch as the memorial omits to state the true annual sum to be paid by the grantor in that event.

LE BLANC J. observed, that the defendant could not have more of his rule granted than for setting aside the warrant of attorney and judgment, over which this Court had an undoubted jurisdiction: but it belonged to another Court to set aside the deeds.

Per Curiam,

Rule absolute to that extent.

(a) 2 *Ves. jun.* 154.

(b) 4 *Term Rep.* 694.

Monday,
May 9th.

The KING against BARKER.

One may be convicted on the stat. 28 *Geo. 3. c. 57.* as the driver of a stage coach, for

A Conviction by a justice of peace on the stat. 28 *Geo. 3. c. 57.* stated, " that on the 4th of *November* 1802, at the parish of *Dunstable*, in the county of *Bedford*, *S. F.* of, &c. came before me *W. M.*, one of his majesty's justices of peace for the said county, and informed me that *John Barker* of, &c. stage

permitting and suffering beyond the proper number of persons to go upon the roof of it, although he be not stated to be a driver employed by the owner, and although he did not appear when summoned before the magistrate, in which case the 2d section of the act directs that the owner shall be liable to the penalty thereby laid on such driver.

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coach driver, on the 2d of *November* now last past, at *D.* aforesaid in the said county did drive a certain coach, called the *Northampton* coach, then going and travelling for hire upon the king's highway, and did then and there permit and suffer six persons, (to wit), nine persons at one and the same time to ride and go upon the roof of such coach when so going and travelling for hire, contrary to the statute made in the 28th of *Geo.* 3. intitled, &c.; whereupon the said *J. B.* after being duly summoned to answer the said charge, did not appear before me pursuant to the said summons, and did neglect and refuse to make any defence against the said charge; but the same being fully proved upon the oath of *J. H.* a credible witness, it manifestly appears to me the said justice that he the said *J. B.* is guilty of the offence charged upon him in the said information: it is therefore adjudged by me the said justice that he the said *J. B.* be convicted; and I do hereby convict him of the offence aforesaid. And I do hereby declare and adjudge that he the said *J. B.* hath forfeited the sum of *6l.* &c. for the offence aforesaid, to be distributed as the law directs, according to the form of the statute, &c. Given under my hand and seal the 11th of *November* 1802," and signed, &c.

Raine objected to the conviction; 1st, supposing the defendant to be the *driver* of the coach, yet as he did not appear when summoned before the magistrate, he could not be convicted; for the 2d section of the act directs, that in case the driver cannot be found or known, "or being found or known shall not attend in pursuance of any summons, &c., then and in every such case the owner or proprietor of such carriage, &c. shall be liable to the penalty hereby laid on such driver."

Lord ELLENBOROUGH C. J. The act does not say that the owner shall in such case be liable to the penalty *in lieu of the driver*: and there is besides a general form of conviction given applicable to the very case where the party refuses to appear on summons.

Raine. Then, secondly, the defendant was not such a *driver* on whom the legislature meant to inflict the penalty; for he is not stated to be a driver *employed by the owner*, one who had the controul of the carriage, and of whom it might be said in the words of the act that he *permitted and suffered* more than the proper number of persons to ride on the carriage. Whereas non constat but that the defendant was a person who held the reins accidentally

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cidentally at the time, or was driving for his amusement under the immediate inspection of the proper driver, and who could not be said to *permit or suffer* the passengers to be there.

Lord ELLENBOROUGH C. J. There are no such words as "*employed by the owner*" annexed to the description of *driver* in the act. It is stated in the conviction that this man *did drive* the coach, which sufficiently designates him as the *driver* within the words of the act. Whether or not he *permitted and suffered* persons beyond the proper number to get up was matter of defence for him before the magistrate. But I am not prepared to say that though he had the conduct of the coach devolved upon him but for a time, yet if he permitted an improper number of persons to get up during that time, he would not be liable to the penalty.

Per Curiam,

Conviction affirmed.

Saturday,
May 7th.

The KING against TERROTT.

Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him containing amongst

THE defendant appealed to the quarter sessions of the borough of *Portsmouth* against a rate made for the relief of the poor of the parish of *Portsmouth*, within the * liberties of the borough, in the county of *Southampton*. The Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The appellant is a lieutenant-colonel in his majesty's royal regiment of artillery, and is, and, during the following periods, was commanding officer of the royal artillery at *Portsmouth*, viz. from the year 1795 to August 1799, and from October 1800 to the present time. The premises in respect of which the appellant is rated are the property of the Crown, and part of a barrack called the *Colewort Garden Barrack*, and until 1801 it was appropriated to the use of the privates of the regiment; the officers, and amongst others the appellant, having quarters in an adjoining building under the same roof. In 1801 the board of ordnance directed a quarter with offices to be fitted up for a kitchen, wash-house, and coach-house, together with a stable-yard and garden; held that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of public service. [*507]

field officer; in consequence of which the privates were removed to another building in the same barrack-yard, and the building, at a considerable expence to the Crown, was altered to its present form. The building in which the appellant resides consists of two stories with four rooms in each floor, besides attics. The rooms on the ground floor are thus appropriated; one room as a store-room, another as a quarter for the adjutant, a third as an office for a commanding officer to transact the business of the regiment, and the fourth as the appellant's kitchen. The whole of the first floor and the attics are the residence of the commanding officer of the artillery for the time being, together with a kitchen, wash-house, and other offices, coach-house, stable-yard, and small garden or drying-ground. The appellant resides there with his wife, family, and servants; two of the latter, a man servant who is one of the private soldiers of the artillery and his wife who is cook to the colonel, sleep in the attic, and the other female servant sleeps in one of the rooms on the first floor. The rate is made for the whole of the premises used by the appellant. The outer door of the building opens into a passage between the office and the room used as a store-room. There is however no communication with that room or the adjutant's quarter by means of the door or passage, nor are they otherwise connected with the apartments of the appellant than being under some of the rooms; the entrance into them being through the door of the adjoining building, in which the other officers have apartments. The part used by the appellant is in every respect separate and distinct from the rest, there being no communication between it and any other apartments, and the outer door above-mentioned leading only to the appellant's apartments, and being subject to his control; except that the store-house and adjutant's quarter are under two of the rooms of the colonel's quarter; and except the office being public for the duties of the service at such hours as the commanding officer pleases. At the time of fitting up the building, chairs, tables, fire grates, and the usual barrack furniture were supplied by the crown; beds, and the residue by the appellant. The appellant is liable to be ordered elsewhere upon service at any moment at the pleasure of the crown. In 1799 he was ordered and went to the *Helder*. On that occasion the command devolved to Lieutenant Colonel *Seward*, who during his absence resided in the apartment in which

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which the appellant resided before his departure, and which he returned to on being again ordered to *Portsmouth* to take the command. The question for the opinion of the Court was, Whether the appellant were liable to be rated in respect of any part of the premises? If he were, the rates to stand: if not, the rates to be amended by striking out his assessment.

Erskine, *Lens* Serjt., and *Gaselee*, in support of the rate, admitted that the property of the crown was not rateable in the occupation of the servants of the crown, occupying it merely as such; but contended that it was rateable when occupied by them beneficially for their own purposes, and when they had a distinct personal enjoyment of it beyond what the necessity of their public or official duties required. This distinction is fully established in the cases of *Greenwich* (a) and *Chelsea* (b) hospitals, the officers of which were holden to be taxable and rateable for the separate apartments enjoyed by themselves and families; in *Rex v. Matthews* (c), where the appellant was rated for the keeper's lodge and two acres of land in *Windsor Great Park*, which he occupied by virtue of his office; and in other cases to the same effect there cited: So in *Lord Bute v. Grindall* (d), where the ranger of a royal park, was deemed rateable for the occupation of inclosed lands within the park, though the produce was partly raised and saved at the king's expence, and partly used by him. On the other hand, where the occupation has been exclusively for the benefit of the crown or public, there the property has been holden not liable to be rated; as in *Lord Amherst v. Lord Somers* (e), where stables were rented by the colonel of a regiment for the use of the regiment, by order of the crown: So in *Holford v. Copeland* (f), where the Masters in Chancery were shewn to occupy their respective apartments in *Southampton Buildings*, merely for the purpose of transacting public business relating to the suits of the court. But there Lord *Alvanley*, in delivering the judgment of the Court, observed, with respect to the porter who lodged in an apartment there to take care of the rooms, that it would be safer that he should not have his wife and family with

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(a) Cited in *R. v. St. Luke's Hospital*, 2 Burr. 1059.

(b) *Eyre v. Smallpace*, E. 23 Geo. 2. B. R. cited *ib.* and 1062, 1064 and 1 *Const.* 100.

(c) *Cald.* 1.

(e) 2 *Term Rep.* 372.

(d) 1 *Term Rep.* 338.

(f) 3 *Bos. & Pull.* 129.

him. And in *Rex v. Catt* (a), the schoolmaster of a charity school was deemed rateable for the personal occupation by himself and his family of the house and garden belonging to the school. It cannot make any difference that the appellant was removeable at pleasure; for that circumstance occurred in several of the cases before mentioned (b). Neither is there any distinction in this respect between civil and military offices; for in *Rex v. Hurdis* (c), the master gunner at *Seaforth*, who occupied the battery-house there, which he held with his office at the pleasure of the crown, was deemed rateable, though one of the rooms of the house was appropriated to and occupied by the under gunner, the appellant occupying the rest as his dwelling-house. Now here the apartments occupied by Lieut. Col. *Terrott* were distinct from the rest of the barracks, and were expressly calculated for the accommodation of a family, with all convenient offices and outlets for their private use, such as coach-house, drying-yard, garden, much beyond what was necessary for his residence as an individual officer placed there for military service only. This was such a residence as was calculated to bring additional burthens on the parish by settling servants and apprentices there.

C. Warren and *Ryder*, contra, said that the only case which pressed at all upon the present was *R. v. Hurdis*; but that was decided solely upon the ground that the Sessions had precluded any question by finding that *Wood*, the master gunner, was the occupier of the battery-house: and Lord *Kenyon*, in delivering his opinion, expressly said that *soldiers* could not be said to be the occupiers of their barracks in the legal signification of the word; they being no more than mere servants. There is a main distinction between military and civil officers in this respect. The acceptance of their offices by the latter is voluntary, and their residence in houses appropriated for their service is necessarily beneficial, and like an increase of emolument. But a military officer has no option to refuse a command of this sort, but is compellable to reside wherever he is appointed by the crown, and removeable again at pleasure. It would be a great hardship and inconvenience if such an one were liable to be rated at every place where he might happen to be quartered in the course of the year. It is very difficult in these cases to

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(a) 6 Term Rep. 332. (b) And vide *R. v. Munday*, 1 East, 584.
(c) 3 Term Rep. 497.

distinguish

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distinguish between what is personal and what is military accommodation. It cannot be contended that the defendant would be rateable for necessary accommodation for himself in the barracks; for then, by the same rule, every common soldier would be liable to be rated for his lodging and the use of the mess-room. It is more convenient and reasonable that the line of distinction should be drawn upon the necessity of the residence, a fact which is easily ascertainable. [Lord *Ellenborough*. That distinction will hardly hold; for an ecclesiastic cannot resign his benefice without the consent of the ordinary; and he is as much bound to residence as this party.] But an officer is more in the nature of a servant, and his residence in the barracks is not given him for his personal accommodation, but for the necessary discharge of his military duty. [Lord *Ellenborough* observed that a *coach house* could not be considered as a building intended for public military purposes.] That and the other buildings were added by the order of Government, whose property they are; they were not built by the defendant upon his own account. The occupation of these, which are provided for him by the crown, does not shew any ability in the officer to pay the rate, which is the ground of rating in other cases. Then if an occupation merely as an officer would not make the defendant liable to the rate, the circumstance of his being married and having his wife reside with him in the same apartments he would otherwise have had cannot alter the character in which he resides. The question must turn on the residence being in *barracks* *quâ* *barracks*, and not on the commodiousness of it. To make a person rateable as *occupier*, he must occupy in his own right, and not as a servant of another, and he must have *some* interest, such as tenant at will at least, in the premises: but Lord *Coke* defines a tenancy at will to be a tenancy determinable at the will of either party; but this officer had no option to determine his occupation. In *Rex v. Field (a)*, one who was employed by the *Philanthropic Society* to superintend the children at annual wages was holden not rateable for her apartments which she occupied in the house. [Lord *Ellenborough*. She was a mere servant, and had no right to bring her family to reside there.] Here the officer has no control over the house except for the purpose of his residence there; he could not have let the apartments or put any other persons than his own family there.

Cur. adv. vult.

(a) 5 Term Rep. 587.

Lord

LORD ELLENBOROUGH C. J. now delivered the judgment of the Court. The question in this case is, Whether the appellant Lieut. Col. *Terrott* is to be considered as an occupier of the premises for which he has been rated? [Here his lordship stated from the case the situation of the premises, and the manner in which they were occupied by Colonel *Terrott* and his family.] These apartments and premises appear to have been put into their present form at a considerable expence by Government, in the year 1801, for the accommodation of the commanding officer of artillery at *Portsmouth* barracks, and the appellant has ever since resided therein. Of the eight rooms, besides attics, one room is a *store* room, another a *quarter for the adjutant*, and a third an office for the *commanding officer* to transact the business of the regiment: the rest of the rooms and offices are all devoted to the *personal use and accommodation of the commanding officer*. If the permanency and duration of the occupation and the quantity of interest which the occupier has in the subject of such occupation were not, as laid down by *Buller J.* in *Lord Bute v. Grindall*, 1 *Term Rep.* 343., generally immaterial, it would still form no question in the present instance, as the appellant has had a long, and has a still continuing occupation (supposing him to be in law an occupier at all) of the subject for which he is now rated, that is, from 1801 to the present time. And the legislature contemplated the situation and ability, at the time, of the party subjected to this rate, which was by the 12th section of the stat. 43 *Eliz.* directed to be a weekly sum; such sum imposed therefore of course with a reference to actual ability at the weekly or other short periods at which the rate is made, and not as to what it might be at any subsequent period. The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or other subject of the rate as a mere servant of the crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal and private respect, then he is not rateable. The property of the crown in the *beneficial occupation of a subject*, whether he be a *civil* officer of the crown, as in *Lord Bute's* case, (who was ranger of the *New Park* near *Richmond*,) and in the case of the comptroller of *Chelsea* Hospital, *Eyre v. Smallpage*, 2 *Burr.* 1059., or as a *military* officer, as in *Hurdis's* case, he is in each case equally rateable. For in these cases each of the persons rated had a degree

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of personal benefit and accommodation from the property enjoyed by him *ultra* the mere public use of the thing ; and which excess of personal benefit and accommodation *ultra* the public use may be considered as so much of salary and emolument annexed to the office, and enjoyed in respect of it by the officer for the time being. But if the use of or residence upon the property be either as *the servant* of the crown and for public purposes only, as in Lord Somers's case, or as a mere public officer or servant, or of any other description, such as the superintendant of the *Philanthropic Society*, *Rex v. Field*, 5 Term Rep. 587., the trustees of a meeting-house, the servants at *St. Luke's*, the Masters in Chancery in respect of their public offices ; in all such cases, the parties having the immediate use of the property merely for such purposes, are not rateable ; because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments. It is said that if the commanding officer be rated for the degree of private accommodation he enjoys in a building of this description, why not the soldiers in their barracks for the accommodation they enjoy there ? I am not aware that private soldiers have any accommodations in barracks beyond what are required for the mere ordinary uses and purposes of animal nature, I mean for sleeping, and eating, and the like : but if their barracks should supply even them with any accommodation of a beneficial and valuable and not strictly of a necessary nature, the analogy between the two cases would rather afford perhaps a ground for including them, under such circumstances, in the rate, than for excluding an occupier of the present description from it. The reason of the thing, and the sound and established construction of the statute subjects every person who has the beneficial use of any local visible property in a parish to this species of public contribution. The parish is liable to be burthened with settlements of them and of their children : a part of the property antecedently contributing to the poor-rate is by being thus built upon and appropriated to such public purposes effectually withdrawn from its liability to contribute, unless the nature and quality of the occupation thereof restores and throws it back again either in the whole or in part within the scope and reach of this species of parochial contribution. And the immediate occupant has in fact nothing to complain of ; for I believe it never has occurred in experience that the quantum of the mere rate upon an occupier of this kind has exceeded in amount the benefit

benefit and advantage derived to him from his occupation. Whether the commanding officer could withdraw himself from the rate, by contracting his occupation in some proportionable degree within the same narrow limits of merely necessary enjoyment with the soldier in his barracks, will be a question to be decided when it shall occur. It is enough for us to say at present that upon the principles laid down and acted upon in the cases already referred to, the commanding officer in question has such a beneficial occupation of these apartments and other conveniences as to render him rateable for the same, and that this rate of course should stand, and the rule for amending the same be discharged.

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Tuesday,
May 10th.

THIS was an action for money had and received, which came on to be tried on the general issue before Lord *Ellenborough* at the Sittings after *Michaelmas* term last, when a verdict was found for plaintiff for 50*l.*, subject to the opinion of the Court on the following case.

Elizabeth Arnold of *Speldhurst* in *Kent*, being seized in fee of the tenements after mentioned to be devised, by her will, dated 20th of *August* 1794, and duly executed and attested, gave as follows: "I give and bequeath all that freehold messuage, tenement, and farm of mine I now hold in my possession, together with the field I bought, to my cousins *John* and *Sarah Luck* during the term of their natural lives, subject to a rent-charge of 10*l.*, per ann., first to my uncle *John Vallance* for the term of his natural life, and from and after his decease to my brother *John Gilbert* for the term of his natural life, which sum of 10*l.* per annum, together with the repairs during the term aforesaid, shall be considered as his rent for the said farm. I give to the said *John Luck* my two best beds with all the

Where one seized in fee of real estate by her will first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir at law for life; which, together with the repairs during the term, should be considered as his rent for

the said farm;" and afterwards she proceeds to make a disposition of her personal property, and then bequeaths and devises "all the rest, residue, and remainder of her effects wheresoever and whatsoever, and of what nature, kind, or quality soever (except her wearing apparel and plate) to certain nephews and nieces, to be equally divided between them by her executors;" held that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir at law, although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenants for life.

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"furniture, the eight-day clock, and the easy chair. I also give to *Elizabeth Boorman* of, &c. the sum of 10*l*. I also give to my nephew *John Gilbert* 5*l*. I will that all my just debts and funeral expences be paid by my executors hereinafter named. I also will, bequeath, and devise *all the rest, residue, and remainder of my effects, whereforever and whatsoever, and of what nature, kind, or quality soever*, (save and except my wearing apparel and plate, which I will to my nieces *Sarah, Anne*, and *Mary Gilbert*,) to my three nephews *John, William* and *Isaac Gilbert*, and their three sisters *Sarah, Anne*, and *Mary*, to be equally divided amongst them by my executors." The testatrix afterwards died without altering or revoking her will, leaving *John Gilbert* her only brother and heir at law her surviving; which will was duly proved by her executors therein named. The said *Sarah Luck* and *John Vallance* are both since deceased. The said *John Gilbert*, as heir at law, claims the reversion in fee expectant on the decease of said *John Luck*, in the freehold estate of the said testatrix, as also of the said annuity of 10*l*. per ann. during the life of the said *John Luck*; and which reversion and rent-charge he on the 10th of *April* last contracted to sell and convey to the plaintiff for 420*l*.; whereupon 50*l*. was paid to the defendant in part of such purchase-money, and the remainder was to have been paid on or before the 24th day of *June* last: but the plaintiff being advised that the title of the defendant to such reversion in fee was defective, or at least very doubtful, refused to complete the purchase, and demanded a return of his said deposit and the expences by him sustained prior to the 24th of *June*, which not being returned, this action was brought to recover the same. And the question for the opinion of the Court was, Whether the reversion in fee after the estate for life to *John* and *Sarah Luck* passed to the nephews and nieces under the will, or descended to the defendant as the heir at law to *Elizabeth Arnold*?

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Wigley, for the plaintiff, contended that the fee passed by the residuary clause to the three nephews and three nieces of the testatrix. It is clear that she did not mean that her heir at law should take an inheritance in the estate, for she gives it in the first instance to her two cousins for their lives, subject to a rent-charge of 10*l*. a year, payable first to her uncle, and after his death to her brother, her heir at law, for his life only. Then the words of the residuary clause are very strong to shew the intent of the testatrix to pass the fee; for she uses the word *devise* there,

there, (which is peculiarly applicable to real estate,) having before only said that she *gave and bequeathed*, when parting with personalty or life interests only. It is true she only gives the residue, &c. of her *effects*; but that word is sufficient in itself to carry land, if such intent be manifest; and here it appears to be used in the most ample sense by the accompanying words, “wheresoever and whatsoever, and of what nature, kind, or quality soever.” In *Hogan v. Jackson* (a) a devise of the “remainder and residue of all his (the testator’s) *effects*, both real and personal,” was holden to carry the fee. [Lord *Ellenborough*. There was the word *real*. *Grose* J. There were besides the introductory words *as to my worldly substance*.] Lord *Mansfield* however said in the course of the argument that he considered the word *effects* as equivalent to *wordly substance*; and the same argument was afterwards insisted upon in the House of Lords (b), where the judgment of *B. R.* was unanimously affirmed: and it appears that there were chattels real to have satisfied the word *real* if the word *effects* had not had a larger interpretation than is now contended for. So in *Doe d. Chilcott v. White* (c) the testator, after devising the residue of his goods and lands to his wife for life, gave her power to give what she thought proper of her *said effects* to her sisters: and held that the widow had power thereby to devise as well the real as the personal estate of her deceased husband which she took under his will. Though the division is to be made by the *executors*, it does not follow that nothing was intended to pass but what they would take *as executors*; for it is not necessary that the mere hand which is to make the division should take any estate; as in *Doe d. Burkitt v. Chapman* (d); unless as in *Doe d. Spearing v. Buckner* (e), the executors as such were to have the management of the fund to accumulate in their hands, which made it necessary for them to take an interest.

Espinasse for the defendant, the heir at law, insisted that nothing passed by the residuary clause but *personal effects*. The general meaning of the word *effects* is confined to personalty, unless other words be added to shew that it was used in a larger sense. But here the accompanying provisions of the will shew that it was used in its usual limited sense; for the immediately preceding bequest is of personal property, and the exception out of

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(a) *Cowp.* 259.(b) 7 *Bro. P. C.* 491.(c) 1 *East* 33.(d) 1 *H. Blac.* 223.(e) 6 *Term Rep.* 610.

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the residue bequeathed is of the same description ; and the division of such residue is to be made by *executors*, which must be of the property after it was turned into money, and no power is given to them to sell the real estate. But further, it is apparent that the testatrix must have meant that her heir at law should take the fee, for the 10*l.* a year rent charge was to be paid to him during the lives of the cousins "as *his rent* for the "said farm," after the death of the uncle ; and though the uncle was to take the rent-charge first, there are no such words annexed to the devise to him. [Lord *Ellenborough* observed, that the only difficulty which occurred against the defendant's interpretation was, that this rent was given to him for life out of an estate, which if he took the ultimate remainder as heir at law might be in him at the time that the rent-charge was made payable to him. That therefore the defendant could only take, if at all, by the omission of the testatrix to dispose of the fee, and not by the operative words of the will. But he intimated that there was no occasion for the defendant's counsel to observe upon the cases cited, which were all distinguishable enough from this.]

Wigley, in reply to the argument drawn from the devise of the rent-charge to be paid to the defendant as "*his rent* for the "farm," answered, that if it had been meant in the sense contended for, it would have been left to him for *the lives of the tenants* of the farm, and not for *his* the defendant's life : but leaving it as she did shewed plainly that the testatrix did not mean that he should take the fee.

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LORD ELLENBOROUGH C. J. The only question is, What was the intention of the testatrix on the face of the will ? If she have expressed no intention to give the fee to any other, her heir necessarily takes it by operation of law. The question then is, Whether the residuary clause include the residue of her *real* as well as of her personal estate not before disposed of ? The principal stress is laid upon the word *effects*. But that word stands alone, and nothing is added to alter its usual signification, as in *Hogan v. Jackson*, where the word *real* was used together with it. But in its natural signification it means *personal effects*. The only other word relied on as carrying the real estate is *devise*, which though technically considered is more applicable to real than personal property might yet be easily mistaken for *bequeath* by an uninformed testatrix. Then what precedes, what follows, and what is excepted out of the residuary clause, all relate

relate to personalty. The words "of what nature, kind, or quality soever," may indeed be said to import realty as well as personalty. But considering the different articles of personal property before enumerated, it is plain that she meant merely to express in general words the whole remainder of her personal property, instead of mentioning each article specifically as she had before done. The only difficulty which occurred in the course of the argument was upon that part of the will whereby she gives an annuity of 10*l.* to her heir at law for his life, after the death of her uncle, out of this estate, which, "together with the repairs during the term aforesaid," she says "shall be considered as *his rent* for the said farm." But the whole doubt arises from the use of the word *his rent* instead of *their rent*. If it had stood *their rent*, the whole sentence would have been clear and intelligible; that is, it would have been considered as the rent of her cousins *John and Sarah Luck*, to whom she had before given the estate for the term of their lives. But however this may be in cases of this sort where there is an omission in the first instance of words sufficient to carry the inheritance, and there are no words in the residuary clause large enough to convey the realty, the rule applies, that the heir at law shall not be disinherited but by express words or necessary implication, neither of which occur in the present case.

GROSE J. The question is, Whether the reversion of the real estate shall go to the heir at law, or pass by the residuary clause? The rule is, that the heir shall only be disinherited by plain words or necessary implication. Then are there any such here? It is clear that there is no devise of this reversion to any person in the first part of the will. I should have wished to have seen the original will; for I do not think it improbable but that the testatrix may have first disposed of her real estate in one paragraph, and then commenced a new paragraph disposing of her personal property in which is included the residuary clause. But be that as it may, she first devises her real property, and then takes up the disposition of her personal property; and after enumerating several specific articles of the latter she devises all the rest, residue, &c. of her *effects*, &c. (with an exception introduced into the same sentence of her wearing apparel and plate) to her nephews and nieces, to be equally divided amongst them by her executors. This disposition is very strong to shew that she did not mean to include the residue of her *real* estate in the word *effects*, because she had before disposed of her real estate in

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the first part of the will, and the residue of her *effects*, must mean her *personal effects*, of which she was then disposing. By *effects* is commonly meant personal property; though I do not mean to say that it may not be applied to real property, as in *Hogan v. Jackson*, where the words "*real and personal effects*" being used, shewed such an intent. But here all the accompanying provisions relate only to personalty; and the rule applies *noscitur à sociis*; for out of these *effects* she excepts wearing apparel and plate. Then again, the effects are to be divided amongst the nephews and nieces *by her executors*; that shews she meant such property as they would be entitled to take *as executors*. What I rely on therefore is, that in the first part of the will the testatrix disposed of her real property, in the next of her personal property: and from the residue of her *effects*, the disposition of which immediately follows, she excepts certain parts of her personal property, leaving the rest to be divided by her *executors*. The devise of the 10*l.* a year rent-charge to her heir at law for his life payable out of this estate, is indeed a strong circumstance to shew that she did not mean him to take the fee; but even unexplained, it is no express disinheritance of him, nor does it operate as such by necessary implication; and with the explanation of it alluded to by my Lord, the whole would stand well together.

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LAWRENCE J. The word *effects* may be taken to mean real estate, if, from other expressions coupled with it, it appear that such was the intention of the testator. But the expressions in wills are so various, that one case cannot in general be made to govern another where different words are used, because the meaning of one man to be collected from one set of words affords no rule for discovering the meaning of another man who has used different words. The word *legacy* has been holden to pass real estate, where from other words in the will such appeared to be the intention of the deviser. But here nothing appears from the words of the residuary clause to shew that the word *effects* was intended to carry the real estate. In general the word *effects* is used to denote personalty, and *wheresoever* means in whatsoever place they were to be found: the other words "*whatsoever, and of what nature, kind, or quality soever*," do not carry the description beyond the notion of personal estate, which may well enough be described in that manner by amplification; they do not shew that the testatrix must have meant to include *real* estate. Then the only other clause relied on is that in which the
rent-

rent-charge of 10*l.* a year out of this estate is given to the heir at law for his life, of which an explanation has been given which will render it sensible and intelligible. The claim of the heir at law to take arises from the omission of the testatrix to devise the reversion away. Then the distribution of the residue is to be made by *the executors*; but that must be understood of that which the law vests in them as such, namely, the personal and not the real estate.

LE BLANC J. The question arises on the word *effects*, as used in the residuary clause, from whence we are to collect what was the intention of the testatrix. *Effects* standing alone must certainly be taken to mean personalty; but it may be extended beyond that, and include real estate by other words used shewing such an intent. But no other words are used in this will which carry it beyond its natural signification. In the first part of the will she disposes of her real estate. And in the clause which has been alluded to in that part I think she must have meant the word *their* instead of *his* rent. For she gives the estate to two persons for their lives, subject to a rent-charge of 10*l.* a year, which rent-charge she first gives to her uncle for life, and then to her brother. This therefore was to be paid by those who were in possession of the estate during the lives of the uncle and brother. But there she stops in the disposition of her real property, and we are left in the dark as to how she intended to dispose of the estate afterwards. She then takes up the disposition of her personal property, and after several specific bequests of it she gives the residue of her *effects* in the manner stated. Taking *effects* in the natural meaning of the word, all the words in the will coupled with it will apply to it in that sense. Then she excepts out of these effects particular species of *personal* property; and then she gives the residue to be divided by her *executors*. All these expressions therefore apply to *personal effects*. The reading the will with this obscurity about it must lead us to throw the real estate on the side where the law has thrown it, unless we can discover from other words of the will a contrary intent. But I cannot find any thing to lead to such a construction; and if we are left in the dark, which it must be confessed that we are as to what her further intent was in respect to the reversion of the real estate, that is sufficient to let the heir at law take.

Postea to the Defendant.

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against
GILBERT.

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1803.

Tuesday,
May 10th.

PARISH *qui tam* against THOMSON and Others.

A dealer in coals by the chaldron who sold to another by the chaldron a certain quantity as and for 10 chaldron of coals pool measure, without justly measuring the same with the lawful bushel of Queen Anne, is liable to the penalty of 50*l.* imposed by the 13th sect. of the stat. 3 Geo. 2. c. 26. upon such defaulters who sell coals by the chaldron or lesser quantity without so measuring them.

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IN debt for a penalty of 50*l.* on the stat. 3 Geo. 2. c. 26. s. 13. for not justly measuring by the bushel of Queen Anne coals sold by the chaldron, the third count of the declaration stated that the defendants, after the 1st of August 1730, and within the space of six calendar months next before the exhibiting of the plaintiff's bill, to wit, on the 17th of August 1802, in London, in the parish of St. Lawrence, in the ward of Cheap, they the defendants then and there being dealers in and sellers of coals by the * chaldron within ten miles of the cities of London and Westminster, to wit, in London aforesaid, in the parish of Saint Andrew by the Wardrobe in the ward of Castlebaynard, that is to say, in the said first-mentioned parish, did sell to one T. Marriott, by the chaldron, a certain quantity of coals as and for ten chaldron of coals pool measure; and the said last mentioned coals afterwards, to wit, on the day and year last aforesaid, in the said first-mentioned parish, did deliver to the said T. M. as and for ten chaldron of coals pool measure: nevertheless the said defendants not regarding the statute in such case made, &c. did not justly measure or cause to be justly measured the said last-mentioned coals so sold and delivered as last aforesaid, with a lawful bushel, (to wit,) such a bushel as is described in and by stat. 12 Ann. as they the said defendants ought to have done, according to the form of the statute, &c.; but then and there wholly omitted and neglected so to do, contrary to the form of the statute, &c.; whereby and by force of the statute, &c. the said defendants forfeited for their said last-mentioned offence the sum of 50*l.*, &c. To this count there was a general demurrer and joinder.

Glead, in support of the demurrer, said that this was a sale of coals by pool measure (which is a known customary measure in the Thames, consisting of an addition of 1-20th of a chaldron to each chaldron properly so called) to which the 13th sect. of the stat. 3 Geo. 3. c. 26., on which the third count was framed, does not apply. This is an act for the general regulation of the coal trade, having in view all the different sorts of measure. The 10th section describes pool measure, and gives a different penalty of 100*l.* against any seller of coals by pool measure (which

is described as a certain allowance by ancient custom in the *port of *London* in the proportion of one chaldron for every score bought on board of ship, and called *ingrain*) who shall not deliver to the buyer the full quantity so sold, together with the *ingrain*. But this part of the act says nothing about measuring by the bushel. The 13th section, in which such measuring by the bushel of *Queen Anne* is required, refers only to sales of coals by *retail*; for it enacts, "that all dealers in and
 " sellers of coals by the chaldron or lesser quantity shall keep at
 " their wharfs, warehouses, and other places for the sale of
 " their coals, a lawful bushel, such as is described in the stat.
 " 12 Ann. st. 2. c. 17. with which bushel they shall justly measure all the coals they shall so sell by the chaldron or lesser quantity," &c. upon pain of forfeiting 5*l.* if they omit so to do. This mode of admeasuring is known in the trade by the name of *wharf* measure (a), as contradistinguished from *pool* measure, which is by the wholesale. A chaldron is a known measure containing a certain number of bushels; which by the very term excludes *pool* measure, which is a fraction of a 20th added to each chaldron. Besides, *pool* measure is not to be measured by the bushel of *Queen Anne*, but by the bushel prescribed by the stat. 16 & 17 Cur. 2. c. 2. which is required to be used in the sale of all coals brought into the river *Thames* and sold by the chaldron, containing 36 such bushels heaped up according to a sealed model kept for that purpose at *Guildhall*. Here it appears by the declaration that the sale, which was in *London*, was of a larger quantity of coals than a chaldron, namely ten chaldron; and therefore the 13th clause of the stat. 3 Geo. 2., which begins with naming the largest quantity to which it relates, namely, a chaldron or *lesser* quantity, does not apply. [*Le Blanc*]. It appears by the act that *pool* measure is estimated by the *chaldron*.]

Knowlys contra. The argument proceeds on an assumption that after coals are in the hands of the dealers there can be no contract for the sale of them by *pool* measure; and the 10th section, so far from saying that *pool* measure shall only be used in buying from the shipper, inflicts a penalty of 100*l.* upon any dealer who shall sell to any person any parcel or quantity of coals as and for *pool* measure, and shall not deliver the same quantity

(a) Wharf measure is spoken of in the stat. 7 Geo. 3. c. 23. and other statutes.

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by the same measure as that by which he bought. The object of that section however was to provide for sales in the River. The 11th section provides in what manner the coals when landed shall be conveyed, namely, in sacks of certain dimensions marked by the proper officer; with liberty (by *f. 12.*) to the purchaser to remove them if he please in his own carts, &c. The 13th section, which is for the further prevention of fraud in the measurement, and requires the sacks as before mentioned to be used by the dealers, also requires the measure of coals sold "*by the chaldron, or lesser quantity,*" to be by the legal bushel of *Queen Anne*, requiring three bushels in each sack before described. All these several provisions are conducing to the suppression of fraud in the several transits of the commodity from the ship to the consumer, and the basis of the whole measure is the bushel of *Queen Anne*, 36 of which go to the chaldron, which chaldron is the basis of the pool measure, with an addition of one chaldron in twenty, and so in proportion for a greater or lesser number of chaldrons. It must therefore be contended by the defendant, if the 13th section do not apply to this case, that if the sale be by wharf measure the dealer is bound to measure justly, but not so if it be by pool measure. As to this section only applying to sales by retail, there is nothing to prevent dealers selling a hundred chaldrons by wharf measure, in which case no doubt they would still be bound to measure justly under pain of the penalty prescribed. Neither is pool measure confined to any particular quantity; for the 10th section regulates the sale of *any quantity* of coals by pool measure. The common measure by which coals are sold by the wholesale in *London* is by the *vat*, containing 9 bushels, which is a customary measure used for convenience in measuring large quantities at a time; but no doubt if any fraud were used in giving less than 9 bushels to the vat, the offender would be liable to the penalty of the 13th section. It may as well be contended that the 11th section does not relate to pool measure, as that the 13th does not; for neither of them speak of it in terms; but both require the same sort of sacks to be used, and the first of them expressly refers to the landing of the coals from the ship. As to the difference contended for between the bushel of *Queen Anne* and that of *Car. 2.*, by which it is said pool and wharf measure are respectively regulated, that is begging the question: and the demurrer admits that the contract was for a sale by the chaldron by pool measure.

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Glead in reply said, that the objection was not to the sale by pool measure again out of the hands of the dealer; but that being by *pool* measure, the provision of the 13th section, which was for ascertaining *wharf* measure by the bushel of *Queen Anne*, did not apply.

LORD ELLENBOROUGH C. J. I feel no great difficulty in disposing of this case. There are two modes of sale of this article, one by pool measure, and the other by wharf measure. The rule of selling by pool measure is given by the 10th section of the stat. 3 Geo. 2. c. 26., by which it appears to be an allowance claimed by ancient custom in the port of *London* of one chaldron to every score, the basis of which measure is the chaldron, a well known quantity, being a multiple of so many bushels. Then by the 13th section another provision is made for the prevention of fraud, whereby all sellers of coals by the chaldron within a certain district in and about the cities of *London* and *Westminster* are to mete their coals by a particular bushel as described in the statute of *Queen Anne*. But what is there in the statute to prevent a person from contracting to buy by the chaldron with pool measure? it is no more than stipulating for the delivery of half a chaldron more above the ten chaldrons which he contracted to purchase by pool measure. It is still a sale by the chaldron with pool measure delivery. Then the defendant, not having justly measured this quantity by the bushel of *Queen Anne*, has forfeited the penalty prescribed by the 13th section of the act.

GROSE J. The whole question is, Whether the 13th section of the act apply to a sale by pool measure? in other words, Whether if a party buy by the measure referred to in the 10th section, he be entitled to the benefit of the 13th section, in having his coals justly measured by the bushel of *Queen Anne*? Now pool measure means no more than that a person buying according to that measure shall have the *ingrain*, as it is called, or customary allowance of the port of *London*, of one chaldron for every twenty chaldrons which he shall contract for. But still he is entitled to have his chaldrons justly measured, and to have the benefit of the 13th section of the act.

LAWRENCE J. The difficulty arises from confounding the provisions of the two sections (the 10th and 13th), and not attending to the different objects which the legislature had in view. A party may either buy coals by pool measure, and then the penalty of 100*l.* attaches if the dealer do not deliver the

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the same proportionable quantity which he received from the ship by the same measure; or the party may contract to buy by the chaldron or common measure, and then the 13th section attaches upon the seller not justly measuring the coals so sold according to the bushel given by the statute of *Anne*. Now it is admitted by the demurrer that the party bought *by the chaldron*, which brings him within the 13th section. But he stipulated to have pool measure; that is, he was to have a certain known allowance upon every chaldron that he bought: still, however, he bought *by the chaldron*. Then was he not entitled to have it measured by the bushel of *Queen Anne*? Clearly he was, by the express provision of the 13th section of the act. Then the defendant not having so measured the coals is liable to the penalty inflicted by that section. Some difficulty might have arisen if the coals had been bought merely *by pool measure*, but here they were bought *by the chaldron*.

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LE BLANC J. The difficulty arises by supposing that a sale by pool measure means otherwise than by the chaldron and bushel; and that this defendant did not contract to sell by the chaldron and bushel referred to in the 13th section. Now here the defendant is charged as one who was a dealer and seller of coals by the chaldron; and the contract stated was to sell *by the chaldron* a certain quantity of coals as and for ten chaldrons of coals pool measure; the meaning of which was, that the buyer was to have ten chaldrons and a half for his ten chaldrons which he contracted for; then the contract being by the chaldron, the penalty given by the 13th section applies as well as if the contract had specifically been for the sale of ten chaldrons and a half, for that was the meaning of the parties by this contract. But it is said that this clause only applies to sales of a chaldron or some less quantity, that is, that it does not attach on a sale of any greater quantity than one chaldron: but that cannot be the meaning, for the words are *by the chaldron*, which does not imply that no more than *one* chaldron is to be purchased at a time; but is contradistinguished from sales by the hundred weight, or the ton, or the like. But this was a sale by the chaldron, which consists of so many bushels. I do not find any statute upon this subject which says that pool measure denotes a measure by a chaldron containing a different number of bushels from wharf measure; but it only means a measure by the ordinary chaldron, with a certain allowance of one chaldron over in twenty.

Judgment for the Plaintiff.

1803.

DOE, on the Demise of DAVID HALLEN, *against* IRONMONGER
and Others.

Tuesday,
May 10th.

IN ejectment for certain premises in *Litchfield* in the county of *Stafford*, which was tried at the last *Stafford* assizes before *Lawrence J.*, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case :

Ann Boylston, being seised in fee of the premises in question, by her will duly executed and attested, dated the 19th of *September* 1756, gave and devised the same as follows ; “ I give and devise unto my nephew *George Boylston* (now supposed to be beyond seas), and to the heirs of his body, all my lands, &c. in the county of *Stafford*, and all other my real and personal estate of what nature or kind soever within *Great Britain*, to have and to hold the said lands, &c. unto my said nephew *G. Boylston* and his heirs for ever, subject to the following proviso : provided, if it happen that my nephew *G. Boylston* or no heir of his body shall be in *Great Britain*, or, if living. shall not come into *Great Britain* personally to claim my said estate within seven years to be reckoned from the day of my death, then I will and direct that my executors shall receive and retain in their hands the rents, issues, interests, and profits of all my estates to and for their own use for ever ; and at the end of the said seven years I give and devise my said estates and every part thereof to *George Hayes*, his heirs and assigns for ever, upon trust that the said *G. Hayes*, his heirs and assigns, shall and may receive the rents, issues, and profits of all my said estates, and do and shall pay and apply the same to and for the maintenance and support of my niece *Sarah* the of *John *Clay Hallen*, and the issue of her body lawfully begotten or to be begotten during the natural life of the said *Sarah*, in such sort, manner, and form as the said *G. Hayes* shall from time to time think most proper ; and from and after the decease of my niece *Sarah*, then upon trust for the use of the heirs of the body of my niece *Sarah* lawfully begotten or to be begotten, their heirs and assigns for ever, without any respect to be had or made in regard to seniority of age or priority of birth. And in default of such issue, then in trust for the use of the right heirs of the said *Ann Boylston* for ever.” The testatrix died about two years after the date of her will, without having

Devise to a trustee to receive and pay the rents and profits for the maintenance of *S.* a feme covert and the issue of her body during her life, and after her decease upon trust for the use of the heirs of the body of *S.*, their heirs and assigns for ever, without regard to seniority of age or priority of birth, and in default of such issue to the use of the right heirs of the testatrix : held that *S.* took only an estate for life, and that the heirs of her body took as purchasers and as joint tenants ; and therefore that the eldest son of *Sarah* dying in her life-time, his eldest son could not take either the whole as heir

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of the body of *S.*, or a part as heir to his father.

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altered or revoked the same. *G. Boylston*, her nephew and devisee, was abroad at the time of her death, and has not since been heard of, nor have any heirs of his body appeared to claim the estate within the time limited by the will; after which the Testator's niece *Sarah*, then the widow of *J. C. Hallen*, came into possession of the devised estate by the permission of *G. Hayes* the trustee, and continued in possession of the same. *Sarah Hallen* had issue one son, *J. B. Hallen*, and two daughters, namely, the defendant *Sarah Ann* the wife of the defendant *J. Ironmonger*, and *Arabella Hallen* the other defendant. *J. B. Hallen* died intestate in the lifetime of his mother, leaving the lessor of the plaintiff *David Hallen*, his eldest son and heir at law, and also four other children, namely, *Sophia*, *Lucy*, *Charlotte*, and *John*, the two last of whom are minors. The lessor of the Plaintiff claims the said premises, as being the heir of the body of his grandmother, the said *Sarah Hallen*, at the time of her death. The question for the opinion of the Court was, Whether the lessor of the plaintiff be entitled to recover any and what part of the premises? If the Court should be of the opinion that he is entitled to recover, then the verdict to be entered accordingly: but if the Court should be of opinion that he is not entitled to recover, then a verdict to be entered for the defendants.

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Williams Serjt., for the lessor of the plaintiff, admitted that *Sarah* the niece of the testatrix did not take an estate tail, but that the legal estate passed to *G. Hayes* the trustee during *Sarah's* life, with a legal contingent remainder to such person or persons as should be the heir or heirs of her body at the time of her death; under which description of heir of her body the lessor of the plaintiff, who was the eldest son of her only son, who died in her lifetime, would be entitled to take the whole: or, if the Court should think that heirs of her body meant children, then such children would take as tenants in common, and the lessor would be entitled to a porportionable share. That the use was executed in the trustee during *Sarah's* life is clear, because he was to receive the rents and profits and pay the same over to her, which he could not do without having the legal estate, which differs from the case of a limitation to a trustee in trust to permit and suffer another to take and receive the rents and profits. *Broughton v. Langley* (a), *Lady Jones v. Lord*

(a) 1 *Lut.* 823. 2 *Ld. Roy.* 873. and 2 *Salik.* 679.

Say and Sele (a) : and the same distinction was recognized in a late case of *Woolley v. Pickard*, before Lord Kenyon at Stafford, and in another of *Jones v. Prosser*, before Lawrence J. at Worcester. And after Sarah's death the legal estate vested in the heir or heirs of her body, according to the same case of Lady *Jones v. Lord Say and Sele*. Of that case it is true that Lord Kenyon, in *Harton v. Harton* (b), observed that it stood by itself ; but he admitted that it was recognized to be law by Lord Hardwicke in *Bagshaw v. Spencer* (c), as it has been by Lord Alvanley in *Kenrick v. Lord Beauclerk* (d). It is true that in Lady *Jones v. Lord Say and Sele*, the trustees were to stand seized of the premises to the use of the heirs of the body, &c. and here the words are only " in trust to the use : " but in *Shapland v. Smith* (e), where the words were the same, Lord Turlow adopted the same rule. The distinction, however, is best taken in *Chapman v. Blisset* (f) for ascertaining where the use shall be executed in a trustee, namely, while any purposes of the trust remain to be answered : and here there was no necessity for it longer than the life of Sarah, who was a married woman. Then the question is, What estate *the heirs of her body* take ? (which he said he should presently advert to.) The word *heirs* is not used by the testatrix in any definite sense in the will ; for in the devise to *G. Boylston*, *heirs* and *heirs of the body* are confounded together. It is contended by the defendant that under the limitation to the heirs of the body of Sarah, their heirs, &c. the children of Sarah, living at her death, would all take as joint-tenants ; but the testatrix could never have intended that if one of the children of Sarah, whom she so much favoured, should die in her lifetime leaving issue, such issue should take nothing. But the words, " *in default of such issue*," which follow, shew that she could not so intend. For if Sarah had had three children, two of whom had died in her lifetime leaving issue, and then the third, who survived, had died without issue, the devise over could not take effect. Admitting that *heirs of the body*, or even *heirs*, may under that description take as purchasers if the intent appear plainly to be so, as in *Doe v. Laming* (g), *Burchett v. Durdant* (h), and other cases :

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(a) 8 Vin Abr. 262. and 3 Bro. P. C. 458. in Dom. Proc.

(b) 7 Term Rep. 654.

(c) 1 Ves. 142. and 2 Atk. 246. 370.

(d) 3 Bos. & Pul. 179.

(e) 1 Bro. Chan. Cas. 75.

(f) Cas. temp. Talb. 145. 150.

(g) 2 Burr. 1100.

(h) 2 Vent. 311.

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yet unless the intent be plain, heirs of the body must take by descent according to the rule of the common law, as in *Co. Lit.* 24.^b and *Moor*, 362. [The Court reminded him of the words which followed, viz. "without respect, &c. to seniority of age " or priority of birth," as plainly shewing an intent that they should take as purchasers.] But supposing that *heirs of the body* meant children in this case, still they would take the remainder in fee as tenants in common and not as joint tenants. For unity of time is one of the properties of joint tenancy: but if the children took as purchasers they would take as they came in esse. And the subsequent words, "without regard to seniority of age or priority of birth," mean only that they should all take equal portions, females as well as males, and those who came in esse last as well as first; but this is compatible with their taking as tenants in common. In *Fisher v. Wigg* (a) a copyhold was surrendered to the use of A., B., C., and D., equally to be divided, and their respective heirs and assigns for ever; and held to be a tenancy in common. So a devise to three equally, as in *Denn v. Gaslin* (b). So the word *several* was holden to make a tenancy in common in *Sheppard v. Gibbons* (c). [Lord *Ellenborough*. There are no such words of severance here.] The word *heirs* alone is sufficient to sever the estate. And it is plain from what follows that all the children were meant to take alike, which could not be without taking as tenants in common.

Jervis contra was stopped by the Court.

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LORD ELLENBOROUGH C. J. All Sarah's children were intended to take together, *without regard to seniority of age or priority of birth*: that must mean that they should take as joint tenants. And as the father of the lessor of the plaintiff died before any severance of the joint tenancy, his children cannot take.

Per Curiam,

Postea to the Defendants.

(a) 1 P. Wms. 14.

(b) Cowp. 657.

(c) 2 Atk. 441.

1803.

CURWEN against SALKELD.

Tuesday,
May 10th.

TO trespass for breaking and entering the plaintiff's close called *The Square*, in *Workington* in the county of *Cumberland*, and selling and disposing of potatoes there, the defendant pleaded the general issue; and also that before and at the time of the trespasses being committed, there was a public open market held in and upon the place in question on *Wednesday* in every week for the sale of potatoes; and justified the breaking and entering at such time and upon such occasion. The replication, after stating by way of inducement that the market for the sale of potatoes had been lawfully removed from the place in question to a certain street in *Workington* called *Washington-street*, and at the time of the trespasses being committed was lawfully holden there, traversed that in and upon the place in question, at the time of committing the trespasses, there was a public and open market holden on *Wednesday* in every week for the sale of potatoes; on which traverse issue was taken by the rejoinder. At the trial before *Chambre J.* at the last assizes at *Carlisle*, a verdict was taken for the plaintiff with nominal damages, subject to the opinion of this Court on the following case.

The manor and parish of *Workington*, which are co-extensive, comprise, amongst other districts, the township of *Workington*, of which the town of *Workington* is a part. In the 15th year of Queen *Elizabeth*, the queen by her charter granted as follows: "Concessimus et licentiam dedimus, ac pro nobis, hæredibus et successoribus nostris, Henrico Curwen militi, domino villæ et manerii de *Workington* in comitatu Cumbriæ, quod ipse et hæredes sui habeant, teneant, et custodiant, &c. *infra villam prædictam* annuatim in perpetuum, quolibet septimanâ per annum, unum mercatum, viz. die *Mercurii*; ac etiam duas ferias sive nundinas per annum singulis annis in perpetuum, &c.; unâ cum curiâ pedis pulverizati, &c.; ac cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi ferias, nundinas, mercatum, et curiam pedis pulverizati pertinentibus seu spectantibus, &c. Habendum, tenendum, utendum, et gaudendum præfato H^o Curwen ac hæredibus, &c. Et quod tempore nungo upon his soil and freehold in the old market-place; and any person is liable to an action of trespass by the lord. [^o539]

The lord of a manor, to whom a grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*; and whether villa extend to the town of *W.* or the township or parish of *W.* the lord has a right to remove the market place from one situation to another within the precinct of his grant. And though he should have holden it for above 20 years within the township of *W.* when the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to going there

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dinarum et feriarum prædictarum, et earum alterius; ballivi prædicti Hi Curwen et hæredum suorum, &c. habeant, percipiant, et colligant custumas et theolonia per legem vel consuetudinem regni, &c. in mercato aut feriis prædictis debita vel consueta, de omnibus mercandiziis et catallis *tam infra libertates ejusdem ville quam extra venditis sive emptis*, sine interruptione seu impedimento nostri, hæredum, vel successorum nostrorum aut aliorum quorumcunque. Et insuper concessimus, &c. præf. to H^o Curwen et hæredibus suis omnia et omnimodis *ordinationem, gubernationem, et assignationem stallarum et placearum, et totum regimen earundem feriarum* et earum cujuslibet per eundem H^m Curwen," &c. By another charter of the 2 Jac. 2., after reciting the letters patent of Queen Elizabeth, and that the market and fairs thereby granted had not for many years been used, the king proceeds to grant, ratify, and confirm the same to Henry Curwen Esq. and his heirs in the same words and as ample manner as before, "*infra villam de Workington: et ordinationem, gubernationem, et assignationem stallarum et placearum, et totum regimen eorundem mercutorum et feriarum,*" &c.

Under these grants a market for all sorts of articles continued to be regularly held in a part of the town of *Workington* called the *Old Market-place* till 30 years since, when the corn market first, and five years afterwards the *potatoe* market, were appointed to be held in "*The Square,*" being the place in question, by the late *H. Curwen* Esq. owner of the said market, and also the owner of the soil and freehold of the place in question, and under and from whom the present plaintiff claims. Until 1767 there were no houses or buildings erected upon the place in question; but in that year *H. Curwen*, then the owner of the soil of the place in question and of the land immediately adjoining thereto, formed the intention of making the place in question, which had till that time been inclosed ground within the township of *Workington*, not built upon, or being any part of the town of *Workington*, into a market-place and square: and with that intention, in 1767 began to make, and from thence from time to time until 1777 continued to make, grants to different persons of different parcels of land immediately adjoining the place in question, for the purpose of building houses upon. All these grants were made for a valuable consideration and in fee-simple. And in one of them, dated the 15th of September 1772, the land thereby granted is described as situate at the head-end of *Portland-street* in *Workington* aforesaid, and containing

taining 12 yards in length of front to the intended square or market-place, &c. And the said grant also contains a covenant by the said *H. Curwen*, that neither he nor his heirs shall at any time hereafter build any house or houses in the intended market-place or square between the first abovementioned parcel of ground and the buildings of *J. J.* (excepting a market-house, moot hall, or other public building for the ornament or use of the said market or square). And the other grants made to the different persons contain similar descriptions of the land and similar covenants with reference to the said market-place or square. Before the end of 1777 *H. Curwen* had granted all the land adjoining the place in question for the purposes aforesaid, except such parts as were left for streets leading into and out of the place in question, and houses were accordingly built upon the land so granted, and a square and market-place formed in the place in question, in addition to or continuation of the streets of the said town of *Workington*; and the said square and market-place was appointed by the said *H. Curwen* to be the only place for the exposing to sale and buying and selling corn and potatoes in his said market. And the said square and market-place from thenceforth until the time of issuing the notice hereinafter mentioned was used by the public resorting there as the sole market for corn and potatoes. On the 26th of May 1802 the plaintiff issued the following notice, which was publicly proclaimed in open market. "Whereas *John Christian Curwen* Esq., lord of the manor of *Workington*, and owner of the market by charter, has found it expedient for the public convenience that the market for potatoes should be removed from the place where they have been exposed to sale in the square, and to be hereafter set down and exposed in the new street called *Washington-street*,"—"Notice is hereby given by Mr. *Curwen* the present proprietor of the market, that on *Wednesday* the 2d of *June* 1802, and for every other market-day following until other notice be given, the place for the potatoe market will be held in the said new street called *Washington-street*, and that the said proprietor of the market is determined after this public notice according to the authorities vested in him by law to bring actions or otherwise prosecute all and every other person and persons who should presume to set down any cart or carts, or any other thing containing potatoes for sale, or set up any table, or erect any stand for the purpose of exposing such potatoes in

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" any other place where he is the proprietor of the soil, save in
" *Washington-street* only, without his leave first of all obtained
" for that purpose." At the time of giving the above notice,
and until and at the time of committing the trespasses, a fit and
convenient place for the potatoe market was set out in the place
called *Washington-street* by the plaintiff on his soil and freehold
there, the same being a new street which the plaintiff was then
forming within the township of *Workington* as an addition to or
continuation of the streets of the town of *Workington*. but upon
ground which had till that time been a piece of inclosed ground,
not built upon or being any part of the town of *Workington*. On
the 2d of *June*, being on a *Wednesday*. the defendant knowing
of the said notice committed the trespasses in the *Square*, as above
complained against him. That the market for the sale of corn
continued to be held in and upon the place in question until,
upon, and ever since the said 26th *May* before mentioned, and
still does continue to be held there; and the plaintiff has from
time to time and at various times since the day of committing
the trespasses received toll for corn sold there on those days since
the day of committing the trespasses. The question for the
opinion of the Court was, Whether at the time of the trespasses
being committed there was a public open market in and upon
the place in question for the sale of potatoes. If the Court shall
be of opinion that there was no such public open market, then
the present verdict to stand; if otherwise, to be entered for the
defendant.

Christian jun. contended for the plaintiff's right to hold the
market wherever he pleased *infra villam* according to the terms
of the grant. *Villa* does not merely imply a contiguity of
houses, but may mean a district within a manor or township.
BraB. lib. 4. c. 31. Fortes. de laud. c. 24. In this sense the
town of *Workington* means the township of *Workington*, as a
vill and manor may be coextensive, *Fleta, lib. 6. c. 51.*, or a
vill and parish. *Wrey v. Vesper (a)*, and *Winchcomb v. God-
dard (b)*.

The Court here called on the defendant's counsel to know
upon what ground he meant to contend for the right of any per-
son to hold a market in this place against the will of the lord.
That supposing the lord had a grant of a market, there could be

(a) *Cro. Jac.* 263.(b) *Cro. Elis.* 837.

no doubt but that it was competent to him to hold it any where within the precinct named in the grant. But if he had no grant, or the place where the market had been holden were not within the grant, then could any person obtrude an usurped market upon the lord, or compel him to continue a usurpation which he was willing to disclaim?

Littledale, for the defendant, said that, taking *villa*, in the sense in which it must be understood with reference to the subject matter, to mean *the town*, in which sense it is explained in *Co. Litt.* 115. b. and to which only a grant of a market can apply, the name being derived from *vehilla*, quod in eam convchantur fructus. then neither *the Square* nor *Washington-street* being within the town at the time of the grants, the market which has been holden in *the Square* is an usurpation, which having continued for above twenty years is good on the part of the public as against the lord, though not as against the Crown, if the Attorney-General thought it advisable to interfere by way of information. And as against the lord, the defendant after the public user for so long time is not bound to shew the origin of it, but it will be presumed to be good; at least it will not lie in the mouth of the lord to shew his own usurpation. [*Lawrence J.* Here the origin is shewn, and therefore there can be no presumption.] But supposing the original place to be within the grant; although the lord might have had an option to place it at first wherever he pleased within the precinct, yet it will not follow that having once appointed it to be holden at a certain place, he can afterwards remove it to another, though within the same precinct. The rights of other persons are implicated to whom grants have been made by the lord.

Lord ELLENBOROUGH C. J. If the lord have a grant of a market within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another situation within the place named in his grant. This was long ago settled in *Dixon v. Robinson* (a), and in modern times has been acted upon in the case of *Manchester market*. There is nothing in reason to prevent the lord from changing the place within the precinct of his grant taking care, at the same time to accommodate the public. Neither is there any authority which says, that having once fixed it he is compellable ever after to keep it in the same place. In many instances there

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(a) 3 Mod. 108.

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may be great public convenience in the owner having liberty to remove it; for the buildings in a growing town may take a different direction away from the old market-place. If the lord in the exercise of his right be guilty of any abuse of the franchise, there may be a remedy of another nature. The right of removal however is incident to his grant, if he be not tied down to a particular spot by the terms of it. Till it be removed, the public have a right to go to the place appointed without being deemed trespassers; but after the lord has removed it, of which public notice was given in this place, the public have no longer a right to go there upon his soil. If a private injury have been sustained by any individual who has been deceived by the lord having holden out to him a particular scite for the market-place, in order to induce him to purchase or build there for the convenience of it, that may be the subject of an action to recover damages for the particular injury sustained by that individual, but does not preclude the lord's general right to remove the market.

*Per Curiam,**Postea to the Plaintiff.*

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Thursday
May 12th.

BUCHANAN against ALDERS and Another.

Upon a writ of error sued out by the principal after the bail are fixed and proceedings against them in *scire facias*, the Court will only stay proceedings against the bail pending the writ of error on the terms of the bail's undertaking to pay the condemnation money, and the costs of the *scire facias*; and if it be a case in which there is no bail in error to pay the costs also of the writ of error if judgment should be affirmed.

A Rule was obtained calling on the plaintiff to shew cause why the proceedings against the bail in *scire facias* should not be stayed pending a writ of error, on their undertaking to surrender the principal or pay the condemnation money within four days after affirmance of the writ of error. And the questions were, first, Whether the bail were fixed before the allowance of the writ of error? and, secondly, if they were, Upon what terms the proceedings were to be stayed? As to the first, it appeared that the writ of error was sued out on the last day which the bail had to surrender the principal *sedente curia*; but it did not appear whether it were in fact sued out before or after the rising of the Court on that day. If it were sued out before, then it int-recepted the fixing of the bail.

Lord ELLENBOROUGH C. J. said that it lay upon the bail who came to ask for an indulgence to shew that the writ of error was sued out on that day *sedente curia*; which they had not done; and the costs of the *scire facias*; and if it be a case in which there is no bail in error to pay the costs also of the writ of error if judgment should be affirmed.

and

and therefore the only question was, Upon what terms the proceedings should be stayed? which the Court would take till the next day to advise upon.

Taddy shewed cause against the rule, and observed that there being no bail upon the writ of error in this case, the Court would only stay proceedings upon the terms of the bail undertaking to pay the condemnation-money, and the costs on the scire facias against the bail, and also the costs on the writ of error in case the judgment was affirmed, as was done in *Ritson v. Francis* (a).

Marryat, contra, contended for the practice to relieve the bail upon the terms mentioned in the rule, if they came at any time before execution levied against them.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. upon this day said that it appearing that the bail were fixed before the writ of error brought by the principal, the Court had considered upon what terms the proceedings should be stayed against the bail pending the writ of error; and they found that the rule of the Court had been that where the writ of error is not brought till after the bail have been fixed, it had only been usual to relieve them by staying the proceedings against them pending such writ of error, on the bail's undertaking to pay the condemnation-money and the costs of the scire facias; and in a case where there is no bail in error, to pay the costs also of the writ of error if the judgment should be affirmed. And upon these terms they would make the rule absolute.

Marryat then said that he would consult the bail whether they would accept the rule upon these terms or pay the debt at once.

(a) 2 *Sira.* 877.

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Friday,
May 3th.FRANK *against* STOVIN.

Under a devise to *A.* for life, *without impeachment of waste*, and with a power of jointuring, remainder to the issue male of *A.*'s body and their heirs, and in default of such issue to *B.* for life, without impeachment of waste and with power of jointuring, remainder to the issue male of *B.*'s body and their heirs for ever : with a proviso that in case *A.* or *B.* should become possessed of any other estate, and be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of the estates should go to the other of

THE following case was sent by the Master of the Rolls for the opinion of this Court.

Richard Frank by his will, in writing dated 19th May 1762, duly executed and attested, gave and bequeathed to his nephew *Bacon Frank*, the plaintiff, all his estates whatsoever as well freehold as copyhold in possession and reversion in the county of *York*, subject as therein mentioned, to hold to the said *B. Frank* for the term of his natural life, without impeachment of waste, and with power to make a certain jointure thereout for any future wife; and from and after his decease, then to the use of the issue male of the body of his said nephew *B. F.* lawfully begotten or to be begotten, and their heirs; (subject as aforesaid.) And in default of such issue then he devised the same estates to the use of his nephew *Richard Frank* and his assigns, for life, without impeachment of waste, subject as aforesaid, with a like power of jointuring : and from and after the decease of his said nephew *R. F.*, then to the use of the issue male of the body of his said nephew *R. F.* lawfully begotten, or to be begotten, and their heirs, subject as aforesaid : and in default of such issue, then to the use of his nephew *Francis Frank* and his assigns for life, without impeachment of waste, (subject as aforesaid,) with a like power of jointuring ; and from and after the decease of his said nephew *F. F.*, then to the use of the issue of the body of his said nephew *F. F.* lawfully begotten or to be begotten, and their heirs for ever (subject as aforesaid). But in case any of his nephews should at any time after his decease become possessed of any other estate than the estate by him devised as aforesaid, and be obliged to change * their name, then he willed that such of his said nephews as should become so intitled should have it in his option to take the estate by him devised as aforesaid, or the other estate as should descend or come to him ; but not to enjoy both the estates ; but that one of the said estates should go and descend to the next brother in remainder immediately after such election his nephews : remainder and residue of the testator's estate to *A.* in fee : held *A.* who had no child till after the death of the testator took an estate tail under the first devise, and that a recovery suffered by him after the birth of a son was good. [°549]

made.

made, And the testator thereby also gave all the residue and remainder of his real estates unto his said nephew *Bacon Frank*, his heirs and assigns. The testator died soon after making his will, and upon his death *Bacon Frank* entered into possession of the said devised estates, which he still retains. And having been advised that he took an estate in tail male in the same, he suffered a recovery thereof as of *Easter term 41 Geo. 3.*, the uses of which were, by certain indentures of lease and release dated the 22d and 23d of *April 1801*, declared to be (as to the premises now in question) to himself in fee. *Bacon Frank* had not any issue living, nor had been married when the testator made his will, nor at the time of the testator's death; but he had issue at the time of his suffering the recovery, who are now living. *Bacon Frank* having been advised, that by the means aforesaid he acquired an estate in fee simple, he, after suffering the recovery, contracted with the defendant *Stovin* for the sale to him of certain parts thereof, but the defendant afterwards objecting to the title, the plaintiff filed his bill against him to compel him to complete his purchase. The question reserved was, Whether the plaintiff *B. Frank* by virtue of the will of the said *Richard Frank*, and the recovery so suffered as aforesaid, and of the deed to lead the uses thereof, took or acquired an estate in fee simple in the premises in question?

Christian for the plaintiff contended, that he took an estate tail by the will, and that the recovery was well suffered: and he relied principally upon *Denn v. Puckey (a)* as in point, where the limitations were in terms the same in substance as the present; the difference being, that there was no power of jointuring there: but an express estate for life being given to the first taker without impeachment of waste afforded the same argument as to the presumed intention of the deviser that he should not take an estate of inheritance; yet the words following, "for default of such issue," namely, issue of the first taker, shewed the weightier intention to be, as Lord C. J. *Wilmot* expressed it in *Roe v. Grew (b)*, that the first taker should take an estate of inheritance. [Lord *Ellenborough*. There was a similar power of jointuring in *King v. Melling (c)*.] So there was in *Papillon v. Voice (d)*, and in *Broughton v. Langley (e)*. The only other

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(a) 5 Term Rep. 299.

(b) 2 Will. 322.

(c) 2 Lev. 58. 1 Vent. 224. (d) 2 Pr. Wms. 471.

(e) 2 Ld. Raym. 874, 5.

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circumstance which differs this case from that of *Denn v. Puckey* is, that there the recovery was suffered before any issue born, which is otherwise here, though the plaintiff had no issue at the time of the will made, nor indeed till after the testator's death. This difference therefore cannot operate upon the question of the estate tail. He also referred to *Robinson v. Robinson* (a), *Hodgson v. Ambrose* (b), *Doe v. Applin* (c), and *Doe v. Smith* (d), and contended that it was clearly the intention of the testator in this case that the estate should not go over to his nephew *Richard* till there was a general failure of the issue of *Bacon Frank*; to effectuate which he must take an estate tail. [*Le Blanc* J. observed, that in *Roe v. Grew* there was no issue of the first taker born.] He concluded with referring to *Page v. Hayward* (e), to shew that a condition not broken was barred by a recovery suffered by tenant in tail; and also to *Gulliver v. Asby* (f).

Horne, contra, endeavoured to distinguish this from the cases cited to shew that the plaintiff took an estate tail, by the several circumstances of the express estate for life, given to him, without impeachment of waste, and with a power of jointuring, which were inconsistent with the notion of giving the first taker an estate tail, and altogether did not occur in any of the other cases, and shewed plainly that the deviser's intention was that he should only take for life. In *Denn v. Puckey* the first taker had no issue at the time of the recovery suffered; and therefore though the Court inclined to think it an estate tail, yet the ultimate decision went on the ground, that whether the first taker took an estate tail or not, yet the subsequent remainder to the issue being contingent might be well barred by the recovery before any issue born, upon the doctrine in *Lodington v. Kima* (g); and therefore Lord *Kenyon* concluded, that quacumque via data without determining whether *N. W.* took an estate tail or for life only, the lessor of the plaintiff was not entitled to recover. And he referred to *Doe v. Cooper* (h), where a devise to a daughter and the issue of her body and their heirs for ever, she having a child living at the time of the devise, was holden to give her only an estate for life, with remainder to her children as purchasers. [*Le Blanc* J. There was no limitation over.]

(a) 1 Burr. 38.

(c) 4 Term Rep. 82.

(e) 2 Salk. 570.

(g) Salk. 224.

(b) Dougl. 326.

(d) 7 Term Rep. 534.

(f) 4 Burr. 1929.

(h) 4 Term Rep. 294.

Christian, in reply, observed that the latter case was a devise to the testator's two daughters to be *equally divided* between them, one moiety to the one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and *their heirs* for ever, she having a child then living. There Lord *Kenyon* relied on this, that if the devise of the second moiety were construed to give an estate tail to that daughter, the estate would not be *equally divided*, contrary to the intent of the testator; for there being no limitation over, the ultimate reversion of the second moiety would be again subdivided between the heirs of the two daughters.

LORD ELLENBOROUGH C. J. This case is clearly ruled by that of *Roe v. Grew*, and it is unnecessary to repeat the language of the Court there again.

The following certificate was afterwards sent to the Master of the Rolls:

This case has been argued before us by counsel: we have considered it, and are of opinion that the plaintiff *Bacon Frank*, under and by virtue of the will of the said *Richard Frank*, and the recovery so suffered as stated in the above case, and the deed to lead the uses thereof, acquired an estate in fee simple in the premises in question.

ELLENBOROUGH.
N. GROSE,
S. LAWRENCE,
S. LE BLANC.

23d of May,
1803.

HILTON *against* KENWORTHY.

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Saturday,
May 14th.

IN replevin the defendant avowed as heir at law of one *Cornelius Kenworthy* deceased, who died seised, and had before leased to the plaintiff, reserving certain rent, and because the

One devised a rent-charge to his wife for life together with the interest of 1200*l.*; and after her decease devised the rent-charge to trustees and their heirs to sell and dispose of the same, and distribute the purchase-money amongst certain persons; and after giving a few small legacies directed his household goods, &c. to be sold; and the money arising from the sale of the rent-charge and from his household goods, &c. and from all other his estate and effects of what nature or kind soever and wheresoever, he directed should be first liable to the payment of legacies, and the residue to be divided into certain parts, which he bequeathed to certain persons; with a proviso that the receipt of the trustees to a purchaser of the rent-charge should be sufficient without seeing to the application of the purchase-money; and then he appointed the said trustees and his wife his executors. Held that the trustees did not take the legal estate in the real property of the devisor.

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rent was in arrear after the death of *Cornelius* and the seisin of the defendant, he entered and distrained, &c. Plea in bar that the said *Cornelius*, being so seised, on the 11th of *December* 1799 made his will, whereby he devised the premises to *G. Woollom*, *James* and *Joseph Lees*, in fee, and afterwards died seised; and traversing that the plaintiff held of the defendant after the death of *Cornelius*. The replication took issue upon this traverse.

This cause was tried at the last *Tork* assizes before Lord *Ellenborough* C. J. when the jury found a verdict for the defendant upon the issue on the above avowry. They also found 59*l.* in arrear of the rent, and that the goods distrained were of that value over and above the charges, &c.; subject to the opinion of the Court on the following case:

Cornelius Kenworthy, being seised in fee of the premises in question, made his will, dated the 11th of *December* 1799, duly executed and attested for passing real estates, by which, after directing payment of debts, &c. out of his personal estate by his executors after named, he devised unto *Dorothy* his wife and her assigns a rent of 90*l.* issuing and payable to him and his heirs out of certain lands, &c. in *Milbrom*, in the county of *Lancaster*, by virtue of a certain indenture of feoffment, dated the 9th of *June* 1788, made between him (the testator) and one *J. Butterworth*, habendum unto the said *Dorothy* his wife and her assigns for her life, subject to the performance on her part of all covenants, &c. in the said indenture contained on his part to be performed. He also gave and bequeathed unto his wife and her assigns for her life the interest of 1200*l.* placed out at interest by him in the hands of Messrs. *Woollom*, *Kenworthy*, and *Back of Stockport*, brewers, when and as such interest should become due; and after the decease of his wife, then he gave and devised the said clear yearly rent of 90*l.* before devised to her unto *G. Woollom*, *J. Lees*, and *J. Lees*, their heirs and assigns, upon trust that they or the survivors or survivor of them, and the heirs and assigns of such survivor, should, as soon as conveniently might be after his wife's decease, sell and dispose of the same rent by public auction for the best price, &c.; and the money arising therefrom should pay and distribute in the manner after directed. And as to the said principal sum of 1200*l.*, after the decease of his wife he gave and bequeathed 1000*l.* part thereof unto and amongst the children of *William* and *Mary Boyle* of, &c. to be equally divided amongst them, share and share alike, when they should respectively attain the age of 21 years. Pro-

vided

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vided that if any of the said children died before their respective legacies should become due and payable, without leaving lawful child or children, then the share or shares of him, &c. so dying to be equally divided amongst the survivors, &c. share and share alike. Provided that if any of the said children should die before, &c. and leave lawful child or children, then that the child or children of such of them so dying should be entitled to his father or mother's share, &c. when such father or mother would have been entitled to the same if living. He also gave and bequeathed 200*l.*, residue of the said 1200*l.*, unto *William Kenworthy* of, &c. to be paid to him in twelve months next after the decease of the testator's wife. He then gave to *A. R.* 200*l.*, and to *S. W.* 100*l.*, to be paid in twelve months next after his decease: and to *M. S.* his portrait, and after the decease of his wife his daughter's portrait. And he directed that all his household goods and furniture, plate, linen, &c. and all other things in his house at his death should be valued within one month after his decease by a proper person to be chosen by his executors; and after such valuation made, that his wife might choose to her own use absolutely such of the goods, &c. as she thought proper, not exceeding half in value of the whole, &c. *As for and concerning the clear monies to arise and be received from the sale and disposal of the said rent of 90*l.* thereinbefore devised in trust to be sold and disposed of on the death of his wife, as also the monies to arise from a sale of the remainder of his household goods and plate, and from all other his estate and effects of what nature or kind soever and wheresoever, he thereby directed that the same should be first liable to the payment of his legacies; and the residue of such monies to arise as aforesaid to be divided into thirteen equal shares. Then he gave and bequeathed six of the said thirteen shares unto the said *J. Lees*, *J. Lees*, *E. B.*, *S. B.*, *R. W.*, and *C. W.*, to be equally divided amongst them and their respective executors and administrators, share and share alike. (In like manner he bequeathed the other shares to different persons.) Provided that when any person or persons should become a purchaser or purchasers of the said yearly rent of 90*l.* the receipt of his said trustees, or the survivors or survivor of them, and the heirs and assigns of such survivor, should from time to time be good and sufficient discharges in law and equity to such purchaser or purchasers (and that the purchaser or purchasers after such receipt should not be obliged to see to the application of the purchase-money, &c.) Provided that it should and might*

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might be lawful to and for his said trustees and the survivors and survivor of them, his heirs, &c. in the first and place from time to time, by, with, and out of the said trust-estate, monies, effects, and premises, to reimburse themselves all such losses, costs, charges, damages, and demands whatsoever which they should sustain, incur, expend, or be put unto, &c. for or by means of the trusts hereby reposed in them, or any thing relating thereto. And also so much money as they or any of them should reasonably deserve for their care and trouble in, for, or by reason of the performance of his will or the execution of the trusts thereby in them reposed, or the management thereof, or any other thing in anywise relating thereto; and that they or any of them should not be answerable for any more monies than what should actually come to their hands respectively, nor for any involuntary loss or misfortune which might happen to the estate and money; nor should the one of them be answerable or accountable for the acts, receipts, neglects, defaults, misapplication, or non-application of the other of them, and that, notwithstanding they might join in receipts, but each of them only for his and their own respective wilful acts, receipts, neglects, and defaults. And lastly, he appointed his wife and the said *G. Woollom, J. Lees*, and *J. Lees*, executors of his will; dated the 11th of December 1799, and properly executed and attested. The testator died seised of such his estate in the premises in question on the 15th of January 1800, without having revoked his will, leaving the defendant his grandson and heir at law. The plaintiff held the premises during the time in the said avowry mentioned, until the death of the testator, as tenant to him at and under the rent and in the manner mentioned in the said avowry, and continued to hold the same after the death of the testator until and at the time of taking the distress as mentioned in that avowry. And it was admitted that the defendant is entitled to the verdict upon the said avowry, if the Court shall be of opinion that the premises did not pass by the will to the devisees therein named: but if the premises in question did so pass, then the plaintiff is entitled to a verdict with nominal damages; and a verdict is to be accordingly entered for him. The question for the opinion of the Court was, Whether upon the death of the testator the premises mentioned passed by his will to his devisees therein mentioned, or descended to the defendant as his heir at law?

Wood

Wood for the plaintiff contended, that the legal estate necessarily passed to the trustees named in the will, from the several provisions made in it and by the residuary clause; though he admitted that there was no express devise of the fee to them. The words in the residuary clause, as for and concerning the clear monies, &c. from the sale of the said rent of 90*l.* before devised *in trust to be sold, &c.*, as also the monies from the sale of his household goods, &c. “and from all other his *estate and effects of what nature or kind soever,*” &c. shews that he meant his executors and trustees to dispose of his *real* as well as *personal* estate, though coupled with antecedent words relating to personal estate. As in *Ridout v. Pain* (a), where a devise of “all the rest, residue and remainder of my goods, chattels, and *personal* estate, together with my *real* estate not herein before devised,” to the devisor’s wife, whom he appointed his sole executrix, was holden to carry the land and inheritance. And in *Scott v. Alberry* (b) there cited, where one gave to J. S. his “wearing-apparel, linen, and books, *with all other his estate whatsoever and wheresoever* not therein before given and bequeathed,” which was deemed sufficient to carry real estate. [There the testator had before devised some real estate to S. T. But what *real* estate is before devised here to the trustees?] He had before devised the rent-charge of 90*l.* a year to his wife for her life, and afterwards directs the trustees to sell and dispose of the real estate, and make distribution of it amongst the persons named. [*Lawrence* J. desired him to point out in what part of the will there was any disposition of the *real* estate to the trustees.] The trustees are to distribute the money arising from the sale; therefore they must have the legal title to enable them to sell the estate.

LAWRENCE J. A power of sale does not of itself give the legal property. Where a man directs his executors to sell, till sale the land descends to the heir at law, and he may enter: so says Lord Coke (c). Here is a proviso that the receipt of the trustees to a purchaser of the rent-charge shall be sufficient; but there is no disposition of the property.

Webberell for the defendant was stopped by the Court.

(a) 1 Atk. 486. (b) Ib. 493. and Com. Rep. 337.

(c) Co. Lit. 236. a.

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Lord ELLENBOROUGH C. J. Here are no words of devise to the trustees, which will carry the legal estate to them. Whether the heir would be considered as a trustee in the mean-time before sale is another question.

Per Curiam,

Posita to the Defendant.

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Saturday,
May 4th.

DEBENFANS against O'BRYEN.

A deed for securing an annuity containing a stipulation that the trustee should permit the grantor to take the rents and profits until default in the payment of the annuity, and that in case the annuity should be in arrear for 60 days the trustee might enter and raise sufficient to satisfy it and suffer the grantor to take the overplus from time to time, is not satisfied by a memorial only describing such deed as containing the usual powers of entry and distress and perception of the rents and profits of the premises for better securing and enforcing the payment of the annuity. [*560]

A Rule called upon the plaintiff to shew cause why the judgments and executions in the defendant's affidavit mentioned should not be set aside, and why the warrants of attorney therein also mentioned should not be delivered up to be cancelled; on the ground that the memorials of the respective annuities were defective in not setting out the trusts of the several deeds; and why 90*l.* levied on the defendant for the arrears of the said annuities, and now in the hands of the sheriff, should not be repaid, and proceedings staid in the mean time.

The affidavit of the defendant stated that he, on the 12th of August 1795, in consideration of 650*l.* paid to him, granted to the plaintiff an annuity of 80*l.* determinable on three lives named, and gave a bond and warrant of attorney to secure the same, and also executed a certain indenture between the defendant of the first part, the plaintiff of the second, and T. Lane a trustee of the third part, whereby the defendant assigned to Lane certain premises for a term of years determinable on the said three lives, upon the following trusts; 1. To permit and suffer the defendant to possess and enjoy the premises and to receive and take the rents and profits to his own use, until default made in the payment of the annuity, at the times therein mentioned. 2. In case the annuity should be arrear for sixty days, being lawfully demanded, then the trustee might enter upon the premises assigned, and out of the rents and profits, or by sale or mortgage of the premises during the remainder of the term, should raise sufficient to satisfy the arrears of the annuity and also all costs, &c. and should pay to or otherwise * permit and suffer the defendant, his executors, &c. from time to time to receive and take the overplus of the rents and satisfaction of the annuity to his own use. It then stated another annuity of 40*l.* granted to the plaintiff by similar securities, and that judgment

had

had been entered up on both the warrants of attorney: and that the annuities having been since assigned to one *Lake*, and the payments being in arrear, executions were sued out upon those judgments against the defendant in the plaintiff's name by *Lake*; whereupon the defendant gave a fresh warrant of attorney to *Lake* to confess judgment for the arrears, on which execution was sued out. The memorial of the indenture only stated the first of the above mentioned trusts in these words: "in which said indenture is contained the usual powers of entry, try and distress and perception of the rents and profits of the said premises for better securing and enforcing the payment of the said annuity." But it wholly omitted the secondly mentioned trust in favor of the grantor.

Gibbs and *Freer* shewed cause against the rule, and insisted that it was unnecessary to state the resulting trust in the memorial; for, whether expressed or not in the deed, it would have resulted by law, and therefore the omission of it could not prejudice the defendant, or conceal from him his right. It was enough to state in the general terms of the memorial that it contained "the usual powers of entry and distress and perception of the rents and profits," &c. In *Toldevay v. Allan* (a), the Court said that the legislature (b) did not mean to require that the memorial should set forth all the trusts which were a lien on the estate, independently of the annuity, such as for payment of taxes, &c.; but only those created in consequence of it. Now here it is done in substance; and therefore is distinguishable from *Denn v. Dolman* (c), where the memorial only set forth that the demise was made by the grantor to a trustee "upon the trusts therein mentioned," without mentioning what the trusts were; and also from *ex parte Ansell* (d), where it only stated that the annuity was redeemable "on such notice, terms, and conditions as were therein expressed." In neither case were the trusts omitted to be stated such as were necessarily implied by law. And in many of the late cases the Court have considered objections of this sort as going beyond the strict letter of the statute, which only requires the names of the parties to be set forth, "and for whom any of them are trustees," without saying that the trusts themselves shall be mentioned. 2dly, They insisted that at any rate the objection came

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(a) 5 Term Rep. 480.

(b) 17 Geo. 3. c. 26.

(c) 5 Term Rep. 641.

(d) 1 Rep. & Pull. 62,

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too late, as the defendant might have resisted payment on this ground when execution was before sued out on the judgment confessed; and having lost his opportunity then, he ought not now to be relieved on summary application; according to *Buck v. Tyle* (a), and *Withy v. Woolley* (b).

Erskine and *Wood*, contra, referred to *Taylor v. Johnson* (c), and were stopped by the Court.

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Lord ELLENBOROUGH C. J. The defendant stands strongly upon the decided cases, which must bind us sitting here; though I fairly say, that if this were a new question I should not give my assent to the necessity of stating the particular trusts in the memorial, when the act of parliament only requires the names of the parties to the deeds, and for whom any of them are trustees, without saying a word as to the trusts. That question, however, is now before the House of Lords upon a writ of error, where these cases may undergo a revision; but sitting here we must be bound by them, especially when some of them have not merely been decided upon summary application, but in a form in which the question appeared on the record, and might have been carried to the dernier resort. But supposing the trusts necessary to be set forth in the memorial, its merely stating that the indenture contained the usual powers of entry and distress, &c. is much too general; for it wholly omits to state the interval of sixty days after the annuity should have fallen in arrear allowed to the grantor before the entry of the trustees, and every other particular modification of the trust.

The other Judges expressed themselves of the same opinion, and *Lawrence J.* particularly referred to the case *ex parte Aspell*, where, after time taken to deliberate by the Court, Lord C. J. *Eyre* said, that they had conferred with all the Judges upon the question, and the result was, that where an annuity was redeemable the terms and conditions of redemption ought to be set forth in the memorial.

Rule absolute.

(a) 7 Term Rep. 495.

(b) *Ib.* 540.

(c) 8 Term Rep. 184. There the deed for securing the annuity stipulated that the trustee should permit the grantor to receive the rents and profits till default made in the payment of the annuity, and then in trust for the grantee; and the memorial stated the trust to be for the grantee generally, which was holden ill.

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The KING against The Inhabitants of ALVELEY.

Wednesday,
May 18th.

TWO justices by an order removed *Jane Hinson*, single woman, from the parish of *Kinver* in the county of *Stafford* to the parish of *Alveley* in the county of *Salop*, in which order it was stated, that upon the complaint of the churchwardens and overseers of *K.* unto the said justices “*Jane Hinson single woman*, had come to inhabit in the said parish of *K.* not having gained a legal settlement there, and that the said *J. H.* is with child, and is therefore deemed chargeable to the said parish of *K.*, they the said justices, upon due proof made thereof, as well upon the examination of the said *J. H.* upon oath as otherwise, and likewise upon due consideration had of the premises, did adjudge the same to be true, and did likewise adjudge that the lawful settlement of the said *J. H.* was in the said parish of *A.*” &c. they did therefore require the said churchwardens, &c. of *K.* to convey and deliver, and the said churchwardens, &c. of *A.* to receive the pauper. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper was settled by birth in the parish of *Alveley*, and some time previous to *Michaelmas* 1801 hired herself to *Edward Con of Dunby* in the parish of *Kinver* for a year, at the wages of 4*l.* She entered upon her service on the 1st of *October* following, and continued therein without interruption till the 2d of *September* 1802, when she being about seven months gone with child, the parish officers of *Kinver* insisted upon her going before two magistrates for the purpose of being examined as to the place of her settlement, and accordingly took her away from her service on the evening of that day, and the next morning brought her before the magistrates, who made the order of removal. The pauper's master had made no complaints against her: he did not consent to her being taken away, but objected to it; as did the pauper herself, who was perfectly able to do her work; and it being harvest time the master could ill spare her. After the pauper's examination had been taken she returned to her master's service; and on the following day the parish officers removed her under the order from *Kinver* to *Alveley*, telling her at the same time that she might return to *Kinver*. The master also told the parish officers that he should

A single woman living in service with her master is not removable even since the stat. 35 Geo. 3. c. 101. s. 6. against the consent both of herself and her master; though adjudged by the order of removal to be with child, and therefore deemed chargeable to the parish in which she was serving; that statute not extending to make persons removable, who were not proper objects of removal before, but only to leave certain descriptions of persons excepted out of the act liable to be removed, though not in fact chargeable, if otherwise proper objects of removal.

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insist on the pauper's returning and serving out the rest of her year. The pauper accordingly returned to *Kinner* and served out the rest of her year, and received her whole year's wages.

Touchet and *Fuller*, in support of the order of Sessions, contended that the pauper was removeable by the express provision of the stat. 35 Geo. 3. c. 101. s. 6. "that every unmarried woman with child shall be deemed and taken to be a person actually chargeable within the true intent and meaning of this act to the parish, &c. in which she shall inhabit, and may be removed as such to the place of her last legal settlement," &c. Now the object of that act was to enable parishes to remove paupers not legally settled therein when they became actually chargeable, instead of removing them upon the supposition only of their being likely to be chargeable, as the law stood before the act. The necessity of this clause was obvious, to prevent such persons having it in their power to settle their bastard children in the place of their birth instead of in the parishes to which they respectively belonged, which is only provided for by the latter part of the clause in case of the birth pending an order for the removal of the mother. The only case on this branch of the act is *R. v. Great Yarmouth* (a), where the Court put a strict construction on the words of the clause, and held that they extended to a certificated single woman with child, though such a person was certainly not removeable before that act, as was ruled in *R. v. St. Mary Westport* (b). If it be said that an order of removal cannot dissolve the contract between the master and servant, the answer is, that no private agreement of the parties can intervene to prevent the execution of a public law in a case falling within it. And in *R. v. Kenilworth* (c), where a pauper was removed by an order out of the service of his master in the parish of A., against which there was no appeal, it was holden to dissolve the contract of hiring for a year under which he was then serving; so that though he returned a few days afterwards to his master in A., and served out his year, and received his full wages, he could not thereby gain a settlement. *Buller J.* there said, "that the order of removal put an end to the service." And in a subsequent case, *R. v. Fillingley* (d), where one residing on a tenement of 10l. a year was removed, Lord *Kenyon* distinguished it from *R. v.*

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(a) 8 Term Rep. 68.

(b) 3 Term Rep. 44.

(c) 2 Term Rep. 598.

(d) *Ib.* 709.

Kemilworth, because "that was a case of master and servant, and there the justices have a power of putting an end to the contract." Then here if the old contract were dissolved by operation of law, the service afterwards was under a new contract, and could not gain the pauper a settlement.

LORD ELLENBOROUGH C. J. If the order of removal were good, no doubt it would operate to dissolve the contract. In *Ren v. Kemilworth*, the order of removal being unappealed from was therefore to be deemed a valid one: but this is now under appeal, and may be controverted. And that brings it to the question whether the order were properly made? Was it not the meaning of the act to prevent the removal of persons until actually chargeable, who were before removable if likely to become so: but not to make persons removable who were not proper objects of removal before that act? Could it be meant that a person in this situation should be liable to be torn away from her parents, whatever her condition in life may be, and how ever far removed from any probability of being a charge on the parish? Is there any instance to be found in the books before this act of a woman under these circumstances, being a person of substance, and yet deemed to be removable? The substance of a person so situated repels the idea of her being chargeable; and the act did not mean to make any person removable who was not so antecedently to the passing of the act. The general provision is, that no person shall be removable till actually chargeable, and the 6th section introduces an exception to that general rule, leaving the persons so circumstanced to the operation of the law as it stood before the passing of the act.

The respondent's counsel observed, that there were no facts stated in the case to shew that the woman was not a person who was likely to become chargeable at the time of the order made, or that the removing magistrates had not exercised their judgment upon that fact: on the contrary, they adjudge her to be chargeable; and before the act in question such a person was removable.

LORD ELLENBOROUGH C. J. There is nothing of that sort stated in the case, nor any thing in the order itself to shew that the magistrates adjudged her to be chargeable otherwise than as a consequence of law in their understanding of the act of parliament: they adjudge *that she is with child*, "and is therefore deemed chargeable to the parish of *Kinver*." But though the act says that such a person shall be "deemed and taken to be actu-

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ally chargeable ;" yet that must be understood *secundum subjectam materiam*, or as the act itself expresses it, " chargeable *within the true intent and meaning of this act*," which I have before explained. It goes on to say, that such a person *may* be removed ; it does not say that she *shall* be so. It lies then upon the respondents to shew that before this act passed the mere circumstance of a single woman in the service of another being with child operated as a dissolution of the contract, and made her liable to be removed against the consent both of the master and servant.

LAWRENCE J. Can it be contended that a single woman in this situation who was a person of substance was liable to be removed before the late act ?

LE BLANC J. The respondents must contend that a single woman within a week of the end of her service, upon being discovered to be three months gone with child, was a person likely to be chargeable.

Gibbs, Clifford, and Jarvis, contra, after the opinion of the Court thus expressed, referred to *Ren v. Marborough* (a), and *R. v. Brampton* (b), as confirmatory of that opinion, that a single woman servant being with child was not a good cause of removal from the service by the overseers of the poor of the parish where she lives, though a good cause of discharge by the master.

Per Curiam,

Order of Sessions quashed (c).

(a) 12 *Mod.* 402. and 2 *Const.* 495.

(b) *Cald.* 11.

(c) Vide *R. v. Oulsworth*, *Burr. S. C.* 302, 4. where a servant who had contracted to serve his master for three years at so much a week under certain conditions was removed during the term, and while he was actually in his master's service, Lord C. J. *Lee* put an end to the argument upon the nature of the contract by saying, " How could the justices remove him out of the service ? It appears that the man was actually in the service at the time of the removal." And the Court quashed the orders.

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1803.

HAYES *against* PERKINS.Wednesday,
May 12th.

NOTICE to execute a writ of inquiry in a country cause was served on the attorney in the country, and not on the agent in town. Whereupon after the damages were assessed before the sheriff in the absence of the defendant, a rule was obtained for setting the inquisition aside upon the ground of irregularity. Against which on a former day

Gaseles shewed cause, contending that the notice was regular, and that it was not like notice of trial for the assizes (a); and cited *Smith v. Lacock* (b), where this very point was ruled; and *Tasbburn v. Havelock* (c), where the distinction was taken between such notice of what was to be done in the country, and notice of any matter to be done only in town, which latter must be given to the agent in town.

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T. Carr, contra, cited *Griffiths v. Williams* (d), where *Buller J.* said, that where there was an agent in town, all notices are given to him, and are not sent into the country.

LAWRENCE J. said he remembered a case some years ago in which he was concerned, where it was ruled by this Court that such notice to the attorney in the country was good; and that the master thought he recollected the same point to have been determined. He therefore desired that the matter might stand over to look for his note of the case.

On the next day he said, that the point had been ruled, as he had intimated, in a case of *Bell v. Trevenna*, *M.* 23 *Geo.* 3.

The Court thereupon discharged the rule, but without costs, and Lord *Ellenborough C. J.* (after consulting with the other Judges) said, that as it was more convenient that the notice should be given to the agent in town by whom the subpoenas are issued, that should be understood to be the rule in future.

(a) 2 *Tidd's Pract.* 679. says, that the notices of trial at the assizes is to be given to the attorney or agent in town, and cites *Say.* 133.; but that is general, and only says that if the attorney be known, notice of executing a writ of inquiry should be given to him or his agent. And 1 *Tidd*, 490. speaking of notice of executing a writ of inquiry, says, that if the defendant's attorney be known, the notice should be delivered to such attorney; and cites the same case.

(b) *Barnes*, 305. (c) *Ibid.* 306. (d) 1 *Term Rep.* 711.

1803.

Friday,
May 30th.

HEYWARD *against* RENNARD and Another, Bail of RENNARD.

If the second writ of scire facias be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the scire facias book in the sheriff's office; which is merely a private book for his own convenience.

A Rule called on the plaintiff to shew cause why the proceedings against the defendants as bail should not be set aside with costs for irregularity, on an affidavit that the defendants' attorney on the first day of the term examined the *scire facias* book at the office of the sheriff of *Middlesex*, and found that a scire facias returnable on that day had been lodged against them in the office, and that on the 3d of *May* he again examined the said book, but no entry was made of any alias scire facias having been left in the office. But on another examination on the 6th of *May* in the scire facias book, it appeared that an alias sci. fa. returnable on the 4th had then been entered in the said book, and a receipt entered there as if the alias sci. fa. had been taken away by the plaintiff's attorney on the 5th; so that the said writ could not have been entered in the said book two whole days before the return: whereas by the practice the second scire facias should have lain four days in the office before it was returned. And that on the 7th of *May* the principal surrendered himself in discharge of his bail.

Wigley shewed cause on an affidavit that the second scire facias had in fact lain five days in the office, though by mistake of the sheriff it was not entered in his book within the usual time, the omission of which he contended ought not to prejudice the plaintiff, who had done all that the law required of him to warrant his proceedings against the bail; and it was the defendants' fault not to search the file.

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Espinasse, in support of the rule, relied on the general practice for the bail to search only the scire facias book in the office, which was kept there by the sheriff for the express purpose of notifying to the practisers whether the writs were out; and that it was not usual to examine the file.

Lord ELLENBOROUGH C. J. (after the Court had consulted the Master) referred to the case of *Sampson v. McGuire*, Mich. term 1801 (a), as having settled the question, that if there be a writ

(a) The following note of the case was read by the Court from the Master's book: "Rule calling on the plaintiff to shew cause why the proceedings

a writ of seise facias on the file lying the proper time in the office that is sufficient, and its not being entered in the sheriff's book is immaterial. That is merely a private book kept for the convenience of the sheriff himself. And if the party be regular in what is required to be done by him, in bringing in the writ to the office and letting it lie there the proper time, no omission of the sheriff in making an entry of it in his own book can make the party irregular.

Per Curiam,

Rule discharged.

proceedings against the bail should not be stayed, &c. and the render of the principal allowed. The application was grounded on the circumstance of there being a mistake in the seise facias book in the sheriff of *Middlesex's* office, which the defendants' attorney had searched to see if any proceedings were taken against the defendants' bail. Rule discharged; the Court considering the book as the *private book* of the sheriff, and that the party should have searched the *original files* for the writs themselves.

MARSDEN *against* REID:

THIS was an action on a policy of insurance on goods on board the ship *Franklyn*, "at and from *Liverpool* to *Paler-
mo, Messina, Naples, and Leghorn*, provided the *French* should
"not be at *Leghorn*." The plaintiff declared as upon a loss by capture, and the defendant paid the premium into court. It appeared that soon after the period of effecting the policy intelligence was received that *Leghorn* was in the hands of the *French*; and that the ship took in goods and cleared out for *Naples only*, and had no goods for any other place on board; and that she was afterwards captured with the goods insured on board by the *French* in the *Bay of Biscay*, and consequently before the dividing point. The plaintiff recovered a verdict at the Sittings after last term at *Guildhall*; to set aside which a rule nisi was obtained on two grounds;

1st, That the ship was represented to be an *American*, by the broker who effected the policy, to the first under-writer to whom she was to go to more than one of the places so named, she must visit them in the order in which they stand in the policy. How far a representation made to one under-writer shall be taken to extend to the rest; and what shall be evidence of it.

whom

1803.

HEYWARD
against
RENNARD

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Friday,
May 20th.

Under a policy of insurance on goods from *A. to B, C, and D,* the risk attached where the ship, which was captured before the dividing point, sailed with intention to proceed directly to *D,* without first visiting the intermediate places: though if she

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against
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whom it was offered for subscription; upon the faith and credit of whose name and judgment, that the risk was safe and the premium adapted to it, the subsequent underwriters must, it was contended, be taken to have subscribed the policy, and therefore that they were entitled to avail themselves of all representations made to him, although not afterwards repeated to any of the rest. And the question intended to have been raised upon this part of the case was, Whether taking the defendant to have underwritten the policy subsequent to another of the underwriters to whom such representation was made, and which representation was not substantiated in proof, the defendant might not avail himself of it as part of the contract of insurance, although in fact it were not known to him at the time of his subscription. It appeared however upon examination of the policy that the defendant's name stood before that of the person to whom the representation was made: and upon further inquiry it appeared that the names of the underwriters in the order in which they had originally been applied to and had agreed to underwrite, (and which was different from that in which their names appeared on the policy), were minuted at the time upon a separate slip of paper, in which list the name of the person to whom the representation was made was the first. This paper was therefore tendered in evidence to shew the order in which the underwriters had in truth engaged, for the purpose of letting in the evidence of the false representation made to the first underwriter in fact, that the ship was *American*. But Lord *Ellenborough* C. J. at the trial, and the Court afterwards upon the discussion of the rule for setting aside the verdict, were of opinion that the paper in question could not be received in evidence for this purpose for want of a stamp; the effect of the evidence being to shew through the medium of a writing, that the contract entered into between these parties was different from that which it appeared to be upon the face of the policy itself, inasmuch as the true contract was to be evidenced by the order in which the underwriters had engaged, as appeared by the paper produced. Though the Court intimated upon the general question, that if it had appeared that a material fact had been represented to the first underwriter to induce him to subscribe the policy, it should be taken to have been made to all the rest without the necessity of repeating it to each.

The second principal ground of objection to the verdict was, that there was no inception of the voyage insured, which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy, according to *Beatson v. Haworth* (a); whereas here it appeared that the vessel never intended to go to *Palermo* or *Messina*, but only to *Naples*, for which place she took in her loading and cleared out.

Erskine, *Park*, and *Gaselee* shewed cause against the rule, and distinguished this at all events from the case cited, because the loss happened here before the dividing point; and therefore at most there could only be said to have been an intention to deviate never executed; and that too only evidenced by the ship having cleared out for *Naples* only, which she might do, and still intend to go there by the way of *Palermo* and *Messina*, for letters, refreshment, consignments, &c. It differs therefore from *Woodridge v. Boydell* (b), where though the loss happened before the dividing point, yet it appeared by the oath of the owner himself that the ship never intended to go to *Cadix* for which she was insured, but sailed upon another distinct voyage. The case of *Beatson v. Haworth* only decided, that where a voyage was described in the policy from *Gottenburgh* to *Leith* and *Cockenzie*, and the ship had taken in goods for both those places, it was not competent to the assured to reverse the order in which the termini ad quos were placed in the policy, and to go to *Cockenzie* first, intending afterwards to proceed to *Leith*. But the true construction of such a policy is, that the ship may go to either of the termini without touching at the others, though if she go to more than one, she must take them in the order in which they stand in the policy. If therefore the ship after going to *Naples* were to go back to *Palermo* or *Messina*, that would be a deviation, as in *Clafon v. Simmonds* (c), the authority of which was confirmed by Lord *Thurlow* in a Scotch appeal in the House of Lords. This was in effect an insurance from *Liverpool* to *Naples*, with liberty to touch at *Palermo* and *Messina*; and though there were no intention to touch at the intermediate places, the underwriters could not complain, as it diminished their risk by so much: the risk which a ship must necessarily incur by putting into any port, not only from the accidents of navigation, fire, embargoes, un-

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(a) 6 Term Rep. 531.

(b) Dougl. 16.

(c) Cited from a note in *Beatson v. Haworth*, 6 Term Rep. 533.

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—
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skillful pilotage, and the like, but from the prolongation of the time during which the underwriters are upon the policy; the premium being always proportioned to the number of places to which a ship is destined.

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Garraw, Gibbs, and Giles, in support of the rule, after premising that the fact was proved and clearly understood at the trial that the ship when she sailed was destined for *Naples* only, contended that this case was governed by that of *Beafon v. Haworth*, which was that the voyage insured must be pursued in the order described in the policy; that in effect the voyage insured here was to *Naples* (*Leghorn* being in the hands of the *French*) by the way of *Palermo* and *Messina*. [*La Blane*]. Suppose the ship had cleared out for *Palermo* only, and manifestly intended to go there only and no farther, was it the intention of the underwriter that the policy should not attach unless she went on to all the other places?] Though it were competent to the assured upon such a policy to go to *Palermo* only, or after going to *Palermo* to stop at *Messina*, without proceeding to *Naples*, because the order described in the policy would still be preserved as far as the voyage was pursued; yet it was not competent for him to omit either of the places first named, and to go direct to the further terminus; for by so doing the course of the voyage insured is altered, and another course substituted in the room of it. And it is no answer to say that the voyage substituted is better for the underwriter; he is to judge of that when he enters into the contract, and it is a sufficient defence for him if the voyage proceeded on be different from that which he contracted to insure. In *Beafon v. Haworth* the loss happened while the ship was at *Cockenzie*, to which she had first proceeded out of the order of the termini named in the policy, and therefore that judgment must have gone on the general ground that it was not competent to the assured to proceed first to the place last named. [*Lord Ellenborough*. It appeared there that the ship was to proceed afterwards to *Acith*, for she had goods on board for that port. To have made the cases the same, there should have been a cargo laden for *Cockenzie* only; and then I do not see that they could have been distinguished.] That was a question of deviation. But here the ship never sailed upon the voyage insured to *Palermo* and *Messina* and far on to *Naples*, but direct to *Naples*, and therefore it is no question of a deviation, meditated and not executed, in which case only the distinction can be made that the loss happened before the

the dividing point; but there was no inception of the voyage insured, and then the loss happening before the dividing point is immaterial, according to *Woolridge v. Boydell*. Suppose a voyage insured from *London* to the coast of *Africa* and the *West Indies*, that would not protect a ship which sailed direct to the *West Indies*, though the course down channel would serve for both. For how could it be known that the underwriter did not consider the more circuitous as the safer course: or supposing it a matter of caprice in the underwriter, still the assured is bound by the terms of the policy. Where it is meant that the assured should have an option to touch or not at intermediate places, there is a common form of policy adapted to such a contract, which runs thus; "from *A.* to *C.*, with liberty to touch, &c. at *B.*"

LORD ELLENBOROUGH C. J. This is not a question of deviation; to raise which it must be assumed that the voyage insured was commenced, and that the ship afterwards went out of her track on that voyage. But there is no question of that sort here; the loss happened before the dividing point to any of the places named in the policy: the only question is, Whether there were any inception of the voyage insured? and I am clear that there was. I think that the voyage insured to *Palermo*, *Messina*, and *Naples*, meant a voyage to all or any of the places named; with this reserve only, that if the ship went to more than one place she must visit them in the order described in the policy. That was the clear meaning of the parties. The assured must only not invert the order of the places as they stand in the policy. And that is in truth all that was decided in the case of *Beaumont v. Haworth*; where it must be remembered that the vessel had taken in cargo for both the places named, *Leith* and *Cockenzie*, and it was assumed that she put into *Cockenzie* first in her way on to *Leith*, where she was to discharge the rest of her cargo. There might have been a question here, Whether, supposing the intention of going only to *Naples* shewed a non-inception of the voyage insured, that non-inception were clearly made out? because, though the cargo were only taken in for *Naples*, yet non constat that the vessel might not have called at the intermediate places in her way. However, I do not presume that such was the intention; I think it more likely that it was not so: but the party who disputes that such was the intention must shew it by evidence.

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For the purpose, however, of this argument I will assume it as a fact that the ship was only going to *Naples*; and then I say that upon the true construction of such an insurance as this the assured is at liberty to drop any of the places named; but that if he go to more than one he must take them in the order named in the policy.

GROSE J. This is a question of inception of the voyage: and though non constat that the ship was not upon her voyage to *Naples*, by way of *Palermo* and *Messina*, when she was captured, yet I will take the fact to be that she was on her voyage to *Naples* only. Then it is objected that this was not the same voyage described in the policy. But it could not be denied that if the ship had sailed for *Palermo* only, as put by my Brother *Le Blanc* in the course of the argument, it would have been within the policy: and if so, I cannot distinguish that case in principle from this: for the objection would equally hold that it was not the same voyage described. But I agree with the construction put by my lord on the words of the policy.

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LAWRENCE J. It is wonderful, considering how much property is at stake upon instruments of this description, that they should be drawn up with so much laxity as they are, and that those who are interested should not apply to some man whose habits of life and professional skill will enable him to adapt the words of the policy to the intention professed by the parties. In construing these instruments we must always look for what was the intention of the parties, without confining ourselves to a strict grammatical construction; for it is impossible in many instances so to construe them, without departing widely from the object intended. Thus we find that a policy meant to cover a risk on goods only will have words relating for the most part to an insurance on ship, to which it would extend but for some loose memorandum: and a policy meant to cover respondentia interest will contain no mention of respondentia except in the margin. The question here then is, What was the intention of the parties to this instrument? was it to insure a voyage round by *Palermo* and *Messina* to *Naples*, or that the assured might, if he pleased, proceed directly to *Naples* without stopping at either of those places? and why are we to suppose that the underwriters meant to stipulate that at all events the ship should take the circuitous instead of the direct course? Is it not rather to be presumed that if the question had been put to the underwriters whether they meant to insist that the ship should go round about by each of the

places named to *Naples*, they would have answered in the negative, because if she went the direct course to *Naples*, it would lessen their risk. It is admitted that if the ship had cleared out for the first place named in the policy, the risk would have commenced although there had been no intention of prosecuting the voyage further. Then there is an end of the objection that the voyage commenced is not identified with the voyage insured. And the case of *Beatson v. Haworth* only decided that if the ship go to more than one of several places named in the policy she must take them in the order named in the policy.

LE BLANC J. I am of the same opinion. The meaning of the policy is that the ship may go to *Naples*, with liberty to go there by the way of the intermediate places, *Palmero* and *Messina*. She did therefore sail upon the voyage insured, which puts an end to any question as to the non-inception of the voyage. And that gets rid of the application of the case of *Beatson v. Haworth*, which was throughout argued and considered as a question of *deviation*; and no question was made as to the non-inception of the voyage; but the ground of the decision was that the ship, insured for *Leith* and *Cockenzie*, meaning to go to *Leith*, went first into *Cockenzie* in her way to *Leith*: it was therefore considered as an actual *deviation* from the voyage insured, being out of the order named in the policy, where the intention clearly was to go to both, and it was assumed that she was going on to *Leith* from *Cockenzie*. The other cases cited do not interfere with our decision here, which turns on the intention of the parties in making this contract. And if we were to construe it otherwise it would be quite beside the usual understanding of the mercantile world and the intention of these parties.

Rule discharged.

1803.

MARSDEN
against
RICE.

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The KING against RICE.

Saturday,
May 21st.

THE defendant, a lieutenant in the navy, was brought up in custody on this day to receive sentence, after judgment by default upon an information filed against him for having sent a

If one kill
another in a
deliberate
duel, under

provocation of charges against his character and conduct however grievous, it is murder in him and his second, and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace.

letter

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against
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letter to his superior officer, provoking him to fight a duel with him, in consequence of certain charges thrown out against him by the other reflecting upon his character and conduct while serving as an officer under him, and of certain acts done by the superior officer tending to degrade the defendant in the eyes of the crew.

GROSS J. in passing sentence upon the defendant censured strongly several circumstances of provocation on the part of the prosecutor, which had led to the challenge given by the defendant. And as to the offence itself he observed; This offence in modern times is so frequent, that it is become alarming to the public, and induces me to suspect, that men either are not aware of the consequences the offence may lead to, or are become insensible to the mischiefs of them. That fighting a duel is a grievous breach of the peace is undoubted, and that it ought to be so considered is as clear; inasmuch as it may lead to one of the worst of crimes, *murder*; the murder of one probably, and possibly of more. I lay stress upon the word *murder*, because I fear some are ignorant, and others will perversely not understand, that to kill a man in a duel amounts to the crime of deliberate murder, whether he that gave or he that accepted the challenge fall. To every lawyer this is a proposition perfectly clear; but that others who are not of the profession may as perfectly be assured of it, I will read only a passage or two from the most able writers upon the subject, to shew that it is a doctrine not of modern date, but coeval with the first institution of our laws. By Sir *Matthew Hale*, as correct, as learned, and as humane a Judge as ever graced a bench of justice, we find it laid down (a), that if *A.* challenge *C.* to meet in the field to fight, and *C.* decline it *as much as he can*, but is threatened by *A.* to be posted for a coward, (an ingredient to be found, I fear, in this case in substance, though not in terms,) if he meet not and thereupon *A.* and *B.* his second, and *C.* and *D.* his second, meet and fight, and *C.* kill *A.*; this is murder in *C.* and *D.* his second, and so ruled in *Taverner's case* (b); in which case, tried before this Court of *K. B.* in this place, it appeared that the deceased was the challenger, and that the prisoner accepted the challenge, as the case terms it, *upon very forcible provocation*. Sir *Edward Coke*, the Lord Chief Justice, laid down the law thus (c): "This is a plain case, and without any question; if one kill another in fight, upon the provocation of him which is killed,

(a) 1 *Hale's P. C.* 453. (b) 1 *Rej. Rep.* 369, 3 *Bulst.* 171.

(c) 3 *Bulst.* 173.

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this is murder." Of the same opinion were the rest of the Court. In this case it is to be observed, that the second, one *Thomas Musgrave*, as well as the principal, was indicted, and the second was outlawed. This precedent may well deter others from taking upon them so illegal and improper an office. And such has been the law recognized at different times down to the present moment, as we may observe by what is laid down by a very learned and able Judge (a) of the last reign; his words are, "that in all possible cases deliberate homicide upon a principle of revenge, is murder; for no man under the protection of the law is to be the avenger of his own wrongs. If they are of such a nature, for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High." Then he goes on: "Upon this principle, deliberate duelling, if death ensueth, is in the eye of the law *murder*; for duels are generally founded in deep revenge; and though a person should be drawn into a duel, not upon a motive so criminal, but merely upon the punctilio of what *the swordsmen falsely call honour*, that will not excuse; for he that deliberately seeketh the blood of another on a private quarrel acteth in defiance of all laws human and divine, whatever his motive may be." Here too we may note this excellent man's opinion upon that punctilio of honour, by the rules of which some men affect to palliate and others to justify crimes of the blackest dye, the grossest frauds, gambling, seduction, adultery, murder. Such was and is the law of honour, and no man who will attend to the subject can doubt of it. In this case, if the prosecutor had not obeyed the law, by consulting his own honour, and not the false honour of swordsmen, and either party had fallen, the other would have undoubtedly been guilty of murder, and liable to an ignominious and fatal sentence: from which had it been his fortune to escape, either from absence of witnesses or any other means that sometimes occur to cause a failure of public justice, the remainder of his life must have been clouded with the dreadful remembrance that for the purpose of giving or receiving that miserable thing falsely called *satisfaction*, he had unnecessarily imbrued his hands in the blood of a brother officer. Fortunately for the defendant, that crime he has not to atone

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The KING
against
R. C.

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(a) Mr. Justice Foster in his *Crown Law*, 296.

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against
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for; he is to receive sentence only for attempting to provoke a duel; the punishment for this offence, as a misdemeanor, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in the offence.

He then adverted to the particular circumstances of the case, amongst which were several of a nature to mitigate very materially the offence, accompanied by affidavits of the defendant's general merits as an officer from many respectable officers of the navy; though there still remained, as he observed, much for which atonement should be made to the public for the intended violation of its peace. Wherefore upon the whole the Court, taking into consideration the imprisonment already suffered by the defendant, (who had been brought up early in the term, and committed to custody in the mean time,) adjudged him to pay a fine of 100*l.* and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in 100*l.* and two sureties in 250*l.* each, and to be further imprisoned till such fine were paid and such securities given.

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Saturday,
May 21st.

WALLEY against MONTGOMERY.

Where the
consignor of
goods abroad
advised the
consignee by
letter that he
had chartered
a certain ship
on his ac-

count, and in-

closed him an *invoice* of the goods laden on board, which were therein expressed to be for *account and risk* of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c. *he paying freight for the said goods according to charter-party*; and the letter of advice also informed the consignee that the consignor had drawn bills on him at 3 months for the value of the cargo: held that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be devested by the consignor's right to stop the goods in transitu in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at 3 months in the manner before stipulated; held that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully.

account

account the ship *Esber*, Captain *Rose* of *Liverpool*; and on the 15th of *May* they wrote him another letter, inclosing him the bill of lading and invoice of the timber after mentioned, and saying that they had sent the charter-party in a letter which Captain *Rose* would deliver; and advising the plaintiff further that they had drawn on him certain bills at three months for the value of the timber. The invoice inclosed was of this tenor: "*Memel*, "4th *May* 1802. Invoice of a cargo of timber shipped by "order and for account and risk of Mr. T. Walley at *Liverpool*, "in the *Esber*, Captain *Rose*." And the bill of lading was dated 14th of *May* 1802, and mentioned the shipping of the cargo in the usual form, "to be delivered unto order or assigns, "be or they paying freight for the said goods according to charter-party;" which was signed by *Rose* the Captain, and indorsed in blank by *Schumann* and Co. The charter-party, though produced, could not be proved at the trial for want of the subscribing witness. *Schumann* and Co. sent another bill of lading of the timber to the defendant at the same time, who appeared from the circumstances to have acted as their agent, though he did not avow himself to be acting in that character at the time; by virtue of which bill of lading the defendant obtained the delivery of the timber from the captain before the plaintiff was apprised of the circumstance, or had made any demand of the same under his own bill of lading: but on the 21st of *June*, two days after the arrival of the timber, finding that the defendant had obtained possession of it, he applied to him, offering to accept the bills drawn on him by *Schumann* and Co. and demanding the timber, which the defendant refused, unless the plaintiff would pay for it immediately. The plaintiff however declined such a mode of payment, insisting on the mode stipulated for by *Schumann* and Co. in their letter to him, by giving his acceptances at three months; in consequence of which the defendant retained possession and afterwards sold the cargo under the authority of *Schumann* and Co. Upon the refusal of the defendant, the plaintiff demanded the cargo from the captain, telling him that he was ready to perform his part of the contract; but the captain said, that he had before delivered it to the defendant, conceiving that he acted by the authority of the shippers: but there was no proof of any tender of the freight having been made to the captain, for want of which the plaintiff was nonsuited.

Gibbs and *Park* shewed cause against a rule for setting aside the nonsuit and granting a new trial, and contended that no legal title to the timber vested in the plaintiff, so as to enable him to

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against
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maintain trover for it. For 1st, the bill of lading to the plaintiff was only conditional, "*he paying freight for the said goods according to charter-party.*" It * was incumbent on him therefore to shew that he had at least tendered the freight, without which he could not make title to the timber under the bill of lading. But 2dly, independent of that objection, the plaintiff cannot maintain trover against this defendant who claims under another bill of lading from the shippers of equal validity with that sent to the plaintiff; and the defendant having first obtained the goods by virtue of a lawful authority, his possession is lawful, and he cannot be treated as a wrong-doer. There is no legal precedence of one bill of lading before another of the same set, but whichever holder first gets possession without fraud is entitled to the priority, according to *Caldwell v. Ball (a)*. Even considering the defendant as standing in the place of *Schumann and Co.*, which was not proved at the trial, still the contract between the plaintiff and them was only executory; for he was not to have the consignment but upon the terms of accepting bills at three months; which was not done: and though his offering to comply with his part might give him a remedy against them for a breach of contract in not delivering the timber, yet their property in it either as the original shippers, or by virtue of the defendant's prior possession under a legal bill of lading, could not be thereby divested, or pass to the plaintiff, so as to enable him to maintain trover.

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Erskine, Garrow, and Scarlett, contra, in answer to the objection made at the trial of the plaintiff's not having tendered the freight, said, that it did not lie in the mouth of the present defendant, however it might have been urged by the captain if the action had been brought against him. But in truth the captain, who was examined as a witness at the trial, made no objection of that kind when the cargo was demanded of him; but said, that if the defendant had not obtained the possession of the cargo, as by the authority of *Schumann and Co.*, he (the captain) should not have objected to deliver it to the plaintiff upon the faith of his afterwards paying the freight. At any rate the defendant cannot make the objection; for supposing the plaintiff to have the best title to the cargo, the defendant who is a wrong-doer cannot create to himself a lien by his own voluntary act, and make himself the creditor of the plaintiff, by paying money for his use without his consent. In *Lempriere v. Pasley (b)*,

(a) 1 Term Rep. 205.

(b) 2 Term Rep. 485.

where goods were delivered to a party claiming them wrongfully, who paid freight and other charges for them, it was holden that he could not detain them for those expences against the rightful owners. The captain may refuse to part with the cargo till he has received the freight; but if he let it out of his possession the lien is gone, and he must resort to his action; and no third person can set up the lien again in his name. Neither will any injustice be worked by the recovery of the plaintiff in this respect: for if the defendant have not paid the freight, the captain will have his remedy against the plaintiff after he is possessed of the cargo; and if the defendant have paid it, when he is dispossessed of the cargo by judgment of law the payment will be without consideration, and he may recover it back again, and then the captain will be entitled to receive it from the plaintiff. Then as to the merits of the case, the whole of the defendant's argument turns on assuming that he was an innocent holder of the bill of lading for a valuable consideration, and without notice of the plaintiff's title: In which case if he got possession of the goods first, he would be preferred to the plaintiff. But it is clear from the whole transaction that the defendant acted as the agent and instrument of *Schumann* and Co., and therefore cannot stand in a better situation than they. Then as between them and the plaintiff, the invoice and bill of lading sent to the latter was a complete transfer of the legal property in the goods; for it appears thereby that the goods were shipped at the plaintiff's risk; and he having offered to do all that he had contracted for, namely, to give his acceptances at three months, may consequently maintain trover for them. The conversion by the defendant was not the taking the goods out of the ship, but the subsequent refusal by him to deliver them up on the plaintiff's demand, and the actual sale of them since. Considering the defendant as the agent of *Schumann* and Co., nothing could justify him in stopping the goods in transitu to the plaintiff but the insolvency of the latter, which is not suggested. It was at all events a question for the jury whether the defendant were not the agent of *Schumann* and Co.

LORD ELLENBOROUGH C. J. If it were not for one piece of evidence which was mentioned late in the cause, and to which my attention was not before particularly directed, I should still be inclined to think that the plaintiff was not entitled to recover; and that is the *invoice*; by which it appears that the goods were shipped *for account and at the risk of the plaintiff*: that is a material piece of evidence on a question, in whom was the property of

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the goods at the time of their arrival here; whether then vested in the plaintiff, subject to a defeazance in case of the non-performance by him of certain conditions on which* the consignment was made, or whether to vest in him at a subsequent time on performance of those conditions? Laying the invoice out of the question, I should still have been of the same opinion as before upon the letter of advice and the bill of lading, that they were conditional. Two things were required of the plaintiff to be done, first, the acceptance of the bills drawn on him at three months, which having been tendered to be performed on his part must be taken as done: secondly, the payment of the freight, which was neither made nor tendered. I will not consider whether the defendant were the agent of *Schumann* and Co.; for whether so or not, he cannot be considered as a wrong-doer if he have obtained possession of the cargo under a competent bill of lading and upon a performance of the conditions, which the plaintiff neglected to perform. If, having no notice of a better title, he were not a wrong-doer when he received the goods, and he has paid the freight and performed the conditions required of him, the goods cannot be taken out of his hands without paying those charges. But taking him to be the agent of *Schumann* and Co. and bound by their engagement, yet he had a right in their name to stipulate for the performance of the two conditions on which the shipment and delivery of the goods were to be made to the plaintiff, namely, the acceptance of the bills, and the payment of the freight. And though the defendant cannot object to the non-acceptance of the bills which was offered to be done by the plaintiff, yet he may make his stand in point of law on the non-performance of the other condition, without which the plaintiff could not be entitled to recover if the question rested there. But here I think the invoice vested the property in the plaintiff; for if there had been a loss at sea, that loss must have been borne by him. -- Then if the property were vested in him, subject only to a defeazance if he did not perform the conditions required of him, I think the plaintiff would be entitled to recover. The doctrine in the case of *Lempriere v. Pasley* only applies to the case of a mere wrong-doer possessing himself of the goods of another without authority, and paying freight for them: but without the invoice in this case the act of the defendant even as the agent of *Schumann* and Co. would not have been tortious, the plaintiff not having performed the conditions required by the letter of advice and the bill of lading: the invoice however vested the property in him.

GROSE J.

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MERY.

GROSE J. In order to sustain this action the plaintiff must prove the property in himself, and a conversion by the defendant. The property of the goods was once in *Schumann* and Co.: but by the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from them to the plaintiff to every purpose except as to the right of stopping the goods in transitu to the vendee: there is no pretence, however, for saying that they were stopped in this case under an exercise of that right. For as far as concerns the acceptances of the bills of exchange drawn on him the plaintiff was ready and offered to give them; and as to the payment of the freight, that was a question between the captain and the plaintiff, with which the defendant had no right to concern himself. The defendant must either have been a purchaser for a valuable consideration, or the agent of *Schumann* and Co. As a purchaser for a valuable consideration, the captain could not be considered as his agent under the bill of lading, so as to entitle him to claim what was due to the captain. But in truth there is no pretence for saying that he was a purchaser for a valuable consideration. He was the mere agent of *Schumann* and Co., out of whom the property was devested by the bill of lading and invoice, and the delivery to the captain for every purpose except that of stopping in transitu. The defendant therefore had no title. But it is said that he had a right to retain for the freight, and that the plaintiff should have tendered it. The defendant, however, had no right to pay freight for the plaintiff. No man can make another his debtor against his will. The plaintiff was bound to pay the captain his freight, and the captain was bound to deliver the goods to the plaintiff; but there was no duty in the plaintiff to pay the defendant the freight; because he was a tortfeasor: standing as *Schumann* and Co. he was detaining the goods from the plaintiff after having passed the property to him; which he must be taken to have done according to *Lichbarrow v. Mason* (a), and other cases. Then the defendant having no right to receive the freight, the refusal by him to deliver the goods to the plaintiff was a conversion.

LAWRENCE J. After what has been already observed, it is not necessary to say more than that the property was vested in the plaintiff, and the defendant converted it.

LE BLANC J. declared himself of the same opinion.

Rule absolute.

(a) 2 Term Rep. 63.

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May 21st.*LEAME *against* BRAY.

Where one accidentally drove his carriage against another's, the remedy is trespass and not case, the injury being immediate from the act done, though he were no otherwise blameable than driving on the wrong side of the road in a dark night. The distinction is, that where the injury is immediate from an act of force done by the defendant the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, there an action on the case lies.

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THIS was an action of trespass, in which the plaintiff declared that the defendant with force and arms drove and struck a single-horse chaise which the defendant was then driving along the king's highway with such great force and violence upon and against the plaintiff's curricule drawn by two horses, and upon and against the said horses so drawing, &c., and in which said curricule the plaintiff was then and there riding with his servant, which servant was then driving the said curricule and horses along the king's highway aforesaid, that by means thereof, the plaintiff's servant was thrown out of the curricule upon the ground, and the horses run away with the curricule, and while the horses were so running away with the curricule the plaintiff, for the preservation of his life, jumped and fell from the curricule upon the ground and fractured his collar bone, &c. Plea, not guilty.

It appeared in evidence at the trial before Lord *Ellenborough* C. J. at the last sittings at *Westminster*, that the accident described in the declaration happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury. But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury having happened from negligence, and not wilfully, the proper remedy was by an action on the case and not of trespass *vi et armis*; and the plaintiff was thereupon nonsuited.

* *Gibbs and Park* now shewed cause against a rule for setting aside the nonsuit, and admitted that there were many precedents of trespass *vi et armis* for an injury immediately proceeding from the party, although his will did not go along with his act; but here they contended that the injury was consequential and not immediately flowing from the forcible act of the defendant, and in such a case trespass will not lie unless such act be done wilfully; and they compared it to the case of one ship running down another, in all which cases the form of the action has been case and not trespass. Yet in the one case the ship is as much im-

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pelled by the agency of the captain as in the other the carriage is impelled by the agency of the driver. In both the injury happens not from the immediate personal act of the parties concerned, but by subsequent contact of the subject matters derived from the impulse communicated for another and lawful purpose, but taking a direction at the time, either from the unskilfulness or negligence of the parties, beyond their controul. Here the accident was solely imputable to the negligence of the defendant in driving on the wrong side of the road in a dark night; but the injury was occasioned by the carriage and horses, and not by his personal act. To make it his personal act it must be done *wilfully*. [Lord *Ellenborough*. I do not find that distinction laid down in any of the cases, that in order to maintain trespass the act must be *wilful*. In *Scott v. Shepherd* (a), Lord C. J. *De Grey* said that trespass *vi et armis* lay against the person from whom an injury was received by force: and he afterwards adverted to acts that might become trespasses by accident or inadvertency. Now here, was not the putting the horse in motion an act of force by the defendant?] The same argument would apply as well to the case of a vessel at sea: and yet there is but one instance of that sort mentioned in the books where trespass was holden to lie, and that was in *Tripe and Another v. Potter* (b), at *Exeter* in 1767, where *Yates J.* nonsuited the plaintiff in case for wilfully rowing his boat against the defendant's net, because the act being *wilful*, trespass was the proper remedy. So in *Ogle v. Barnes*, where the allegation was that the defendant so negligently and unskilfully steered his vessel that she ran foul of and damaged the plaintiff's vessel, Lord *Kenyon* distinguished it from actions of trespass where the act was laid to be done *wilfully*, or *furiouly*, which implied wilfully: and the other Judges thought that if upon a declaration in case it appeared in evidence that the act were wilfully done the plaintiff must be nonsuited. [Lawrence J. There certainly are cases in the books where the injury being direct and immediate, trespass has been holden to lie, though the injury were not intentional. As in *Weaver v. Ward* (c), where the defendant exercising in the trained bands and firing his musket accidentally hurt the plaintiff; and in *Underwood v.*

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(a) 3 *Wils.* 411. S. C. 2 *Blac.* 892.(b) 6 *Term Rep.* 128. and 8 *Term Rep.* 191.(c) *Hob.* 134.

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Hewson (a), where one uncocking a gun, it went off and accidentally wounded a bystander. In *Ogle v. Barnes* (b) it did not appear that the force which occasioned the injury was the act of the defendant. But it might have happened from the force of the wind or tide operating at the time directly against the force used by the defendant.] Here the continuing motion of the carriage was not the immediate act of the defendant. [Lord *Ellenborough*. If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass.] The case of throwing the squib (c) was put upon that ground, but that has never been approved since. [Lord *Ellenborough*. That case to be sure goes to the limit of the law. *Lawrence J.* The question is, Whether the injury be immediate from an act done by the defendant, or whether it be consequential only from such act? If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass.] Perhaps a defendant might be liable in trespass for that which is the immediate consequence of a forcible act done by himself; but for that which is not the immediate consequence of his own act, but is the consequence of some other act which he negligently, improvidently, or unskilfully did, he is only liable in case. [Grose J. There is a case put in the Year-book 21 H. 7. 28 a. that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass. Lord *Ellenborough*. The only rule I believe will be found to be where the injury happens from an immediate act of force of the defendant, there it is trespass. And if one put an animal or carriage in motion which causes an immediate injury to another, he is the actor, the causa causans. It is not to be wondered at that actions for running down ships should have been brought in case; for the plaintiff would fail in almost every case in proving that the injury happened from the immediate act of the master where the action is brought against him: it happens more frequently from the negligent or improper execution of orders by some of the seamen, for which the master would not be liable in trespass (d). The boundaries of actions cannot depend upon such

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(a) 1 *Str.* 596.(b) 8 *Term Rep.* 188.(c) *Scott v. Shepherd*, 3 *Wils.* 403.(d) Vide *M^cManus v. Crickett*, 1 *Eas.* 106.

nice calculations as whether the injury happened by the last impulse given to a vessel or carriage by the defendant: the only plain and solid distinction seems to be, whether or not the injurious act were done wilfully; and though particular cases may have erred in the application of it, most of them, particularly *Ogle v. Barnes*, seem to have gone upon that principle. [Lawrence J. The word *wilful*, and other words equivalent to it, were there used in answer to arguments adduced from cases where the acts were *wilfully* done, and with a view to distinguish those cases from the principal one then in judgment before the Court. *Le Blanc J.* In several of the cases where the word *wilfully* has occurred it will be found that the Court were commenting upon other cases where the acts were laid to be done *wilfully*. *Lawrence J.* No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not. Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road where persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass.]

Erskine and *Hovell* in support of the rule. The distinction which was taken in *Reynolds v. Clarke (a)* has been adopted in all the subsequent cases, that where the immediate act itself occasions a prejudice or is an injury to the plaintiff's person, &c. there trespass *vi et armis* will lie: but where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, &c., there trespass *vi et armis* will not lie, but the proper remedy is by an action on the case. So in *Day v. Edwards (b)*, Lord *Keynon* said, "If the injury be committed by the immediate act complained of, the action must be trespass: if the injury be merely consequential upon that act, an action upon the case is the proper remedy." And he exemplified it by the instance (c) of a man throwing a log into the highway, which if, in the act of throwing, it hit another, it is trespass; but if as it lies there the other tumble over it, he must bring case. The declaration there charged that the defendant "so furiously, negligently and improperly" drove his cart against the plaintiff's carriage that it overturned and damaged

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(a) 2 Lord Ray. 1402. recognised in *Bull. N. P.* 26. and 79., where some other cases are referred to.

(b) 5 Term Rep. 649.

(c) 1 Stra. 636.

it:

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it: but non constat that it was done *wilfully*, however *furiouſly*; and on the contrary, the allegation of its being done *negligently* as well as *furiouſly* rebutted the idea of wilfulness: yet the Court held that the injury enſuing upon the immediate act of the defendant, the action ought to have been trespass, and not case, as it was laid to be. In *Ogle v. Barnes (a)* the Court could not say that the act done was by the immediate agency of the defendants: it was charged to be done by their negligence, carelessness, ignorance, and unskilfulness; non constat but that the act which produced the mischief was done the day before; they might not have been in the ship when it happened. In none of the cases is it laid down as a branch of the distinction that the act done must be either *wilful*, or *illegal*, or *violent*, in order to maintain trespass: the only question is, whether the injury from it be *immediate*.

LORD ELLENBOROUGH C. J. The true criterion seems to be according to what Lord C. J. *De Grey* says in *Scott v. Shepherd*, whether the plaintiff received an injury *by force* from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my brother *Grise*, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. Such also was the case of *Weaver v. Wood*, in *Hob.* 134. where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in *Scott v. Shepherd* did wilfulness make any difference. If the injury were received from the personal act of another, it was deemed sufficient to make it trespass. In the case of *Doy v. Edwards* the allegation of the act having been done *furiouſly* was understood to imply an act of *force* immediately proceeding from the defendant. As to the case of *Ogle v. Barnes*, I incline to think it was rightly decided; and yet there are words there which imply force by the act of another: but, as was observed, it does not appear that it must have been the personal

act of the defendants; it is not even alleged that they were on board the ship at the time: it is said indeed that they had the care, direction, and management of it; but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case, because there were no words in the declaration which necessarily implied that the damage happened from an act of force done by the defendants themselves. I am not aware of any case of that sort where the party himself sued having been on board this question has been raised. But here the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass; and wilfulness is not necessary to constitute trespass.

GROSE J. I am of the same opinion. Looking into all the cases from the Year-book in the 21 H. 7. down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass. The case mentioned from *Strange*, that in *Hobart*, and those in the *Term Reports*, all agree in the principle.

LAWRENCE J. I am of the same opinion. It is more convenient that the action should be trespass than case; because if it be laid in trespass, no nice points can arise upon the evidence by which the plaintiff may be turned round upon the form of the action, as there may in many instances if case be brought; for there if any of the witnesses should say that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being nonsuited. But in actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of the party doing it to commit the injury: but, as mentioned by Mr. Justice *Blackstone* in the case of *Scott v. Shepherd* (a), on the difference between injuries direct and immediate, or mediate and consequential; in the one instance the remedy is by trespass, in the other by case. The same principle is laid down in *Reynolds v. Clarke* (b). As to *Ogle v. Barnes*, I certainly did not mean to say that the distinction turned on the wilfulness of the act; I only made use of the

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(a) 2 Blas Rep. 895.

(b) 2 Ld. Ray. 1402.

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word *wilful* to distinguish that from other cases which had been mentioned where the injurious acts were averred to be *wilfully* done, and where as the acts complained of were charged as intentional, and the injuries done immediately referred to them, trespass was determined to be the proper remedy. And so I understand what was there said by my brother *Grose*. What I principally relied on there was, that it did not appear that the mischief happened from the personal acts of the defendants: it might have happened from the operation of the wind and tide counteracting their personal efforts at the time: or indeed they might not even have been on board. Alleging that the defendant negligently did such an act may be sustained by proof that it was done by his servant in his employ in the absence of the master, according to *Michael v. Alestree* (a), followed up by *Brucker v. Fromont* (b). Those were actions on the case, and are reconcileable with *M^r Mannus v. Crickett* (c), in which case the Court held that *trespass* would not lie against a master for the wilful act of his servant in driving his master's carriage against another's carriage, against the will of his master.

LE BLANC J. In many of the cases the question has come before the Court upon a motion in arrest of judgment, where the Court in determining whether trespass or case were the proper remedy, have observed on the particular language of the declaration. But in all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well illustrated by the example put of a man's throwing a log into the highway: if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. Neither does the degree of violence with which the act is done make any difference: for if the log were put down in the most quiet way upon a man's foot, it would be trespass; but if thrown into the road with whatever violence, and one afterwards fall over it, it is case and not trespass. So here, if the defendant had simply placed his chaise in the road, and the plaintiff had run against it in the dark, the injury would not have been direct, but in conse-

(a) 2 Lev. 172. (b) 6 Term Rep. 659. (c) 1 Eglt, 106.

quence only of the defendant's previous improper act. Here however the defendant was driving the carriage at the time with the force necessary to move it along, and the injury to the plaintiff happened from that * immediate act: therefore the remedy must be trespass: and all the cases will support that principle. It is chiefly in actions for running down vessels at sea that difficulties may occur; because certainly the *force* which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon: and whether that may make any difference in that case I will not now take upon me to determine. But here, where the personal force is immediately applied to the horse and carriage, the things acted upon and causing the damage, like a finger to the trigger of a gun, the injury is immediate from the act of driving, and trespass is the proper remedy for an immediate injury done by one to another: but where the injury is only consequential from the act done, there it is case.

Rule absolute.

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against
BRAY.
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PEDLEY *against* WESTMACOT.

Saturday.
May 21st.

GARROW and Marryat, upon shewing cause against a rule for setting aside an award, objected to the Court's entertaining jurisdiction of it, because the consent in the submission-bond was to make the *award* a rule of Court instead of the *submission* to the award, which was not within the words of the statute 9 & 10 W. 3. c. 15. s. 1. making it lawful for parties, "desiring to end any controversy, &c. by arbitration, to agree that their *submission of their suit to the award* of any person should be made a rule of any of his majesty's courts of record," &c. And they cited *Harrison v. Grundy* (a), where the same objection prevailed. But

The Court referred to a case, furnished them by the Master, of *Powell v. Phillips*, E. 30 Geo. 3. (b), where the submission-

The Court have jurisdiction in the case of an award under the st. 9 & 10 W. 3. c. 15., though the submission-bond were to make the *award*, instead of the *submission*, a rule of Court.

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(a) 2 Stra. 1178.

(b) The same case is referred to in 2 Tidd's PraB. 734. as of E. 20 Geo. 3.

bond

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against
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bond stating that the *award* should be made a rule of Court instead of the *agreement*, was holden to be no objection. And this, Lord *Ellenborough* said, was the later and more sensible determination, and therefore the objection here was overruled; and

Erskine, who had moved for the rule to set aside the award, was heard in support of his objections to it.

Monday,
May 23d.

The KING against The Sheriff of MIDDLESEX.

After a bail-bond taken, and an attachment issued against the sheriff for not bringing in the body, the Court will relieve him on payment of what is due to the extent of the penalty in the bail bond, though less than the plaintiff's demand.

THIS came on upon a rule to shew cause why upon payment by *Walley* (the defendant in the original cause) to *Hales* and another, administrators of *Coussmaker* (the plaintiffs) of 88*l.* 14*s.* 2*d.* and interest, the debt due at the time when the action was commenced, with costs, the present attachment against the sheriff for not bringing in the body should not be set aside with costs to be paid by the plaintiffs to the defendant, the sheriff, or his attorney.

The original writ was issued in *October* last, indorsed for bail for 88*l.* and upwards, by virtue of an affidavit sworn on the 29th of *October*, that the defendant was indebted to the plaintiffs in 88*l.* and upwards, upon a bond * in the penal sum of 709*l.* 13*s.* 4*d.*, conditioned for payment of 354*l.* 6*s.* 8*d.* with interest from the 17th of *May* preceding, by four quarterly installments, of which one installment only was due at the time of issuing the original writ. Subsequent to the issuing of the original writ, and before the issuing of the writ of pluries testatum special capias, on which the defendant was arrested, another installment had become due; but no new affidavit of debt being made, the latter writ was indorsed for bail in the same sum as the first, and the defendant gave bail to the sheriff in 176*l.*, double the sum so indorsed. The rule for bringing in the body expired on the 3d of *February*, when no bail being put in above, the attachment issued. The plaintiffs now claimed for installments due and interest upwards of 176*l.* besides the costs.

Gibbs shewed cause against the rule, and contended that the sheriff, being in contempt, could only be relieved on payment of the whole sum due on the original bond put in suit, and that the

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the plaintiffs were not limited in their demand by the penalty of the bail-bond taken by him, they being injured to the amount of all that they might have recovered against the original defendant in the suit. And he cited *Heppel v. King* (a), *Stevenson v. Cameron* (b), and *Fowlds v. Macintosh* (c); in which latter case a bail-bond had been taken.

Park, contrà, said that in the two first-mentioned cases no bail-bond had been taken by the sheriff, which was a breach of his duty, and the defendant was thereby put in a worse condition than he ought to have been. And though there was a bail-bond in the last-mentioned case in *C. B.*; yet in the first edition of *Tidd's Pract.* 1 vol. 166. (omitted in the 2d edition), a case was mentioned of *Stakey v. Peel*, *E. 25 Geo. 3.*, as contrary to that. The bail below are only liable to the extent of the debt actually due within the penalty of the bail-bond; and the sheriff is only liable for what the bail would otherwise have been liable to.

Curia (d) adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This was a rule for setting aside an attachment against the sheriff in a cause of *Hales v. Wolley*, for not bringing in the body, on payment of the debt due at the time the action was commenced. The action was debt on bond for the penalty given to secure the payment of money by installments. It was contended that the sheriff could be relieved only upon payment of what was due to the plaintiff; for which purpose *Heppel v. King* (e), *Stevenson v. Cameron* (f), and *Fowlds v. Macintosh* (g) were cited. On the other hand we were referred to 1 *Tidd's Practice*, 166. (1st edition). The question we had to

(a) 7 Term Rep. 370.

(b) 8 Term Rep. 28.

(c) 1 H. Blac. 233.

(d) *Lawrence J.* observed that there was an inaccuracy in the wording of the report of *Heppel v. King*, 7 Term Rep. 372. in what he is made to say concerning the *recognizance* of the bail below. Bail below do not enter into a *recognizance*, but give a *bail-bond* to the sheriff.

(e) 7 Term Rep. 370. (f) 8 Term Rep. 28. (g) 1 H. Blac. 233

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The KING
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consider was, Whether the sheriff should be liable beyond the penalty of the bail-bond? and upon full consideration of the cases cited we are of opinion that he shall not be liable beyond such penalty.

END OF EASTER TERM.

AN INDEX OF THE PRINCIPAL MATTERS.

ACCORD AND SATISFACTION.

ONE of three joint covenants gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered: held such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact. *Drake, Clerk v. Mitchell and others*, H. 43 G. 3.

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ACTION ON THE CASE.

1. In an action against three, wherein the plaintiff declared that *they* had the loading of a hogsheaf of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the *defendants* so negligently conducted themselves in the loading, &c. that the hogsheaf was damaged: held that the gift of the action was the *tort*, and not the *contract* out of which it arose; and therefore that on plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. *Govett v. Radnidge and others*, M. 43 Geo. 3. 62
2. Where a Plaintiff declared that the defendants, who had chartered his ship,

put on board a dangerous commodity, (by which a loss happened) *without due notice* to the captain or any other person employed in the navigation, it lies upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship (which first mate was dead, and no other person was present to depose to the conversation which passed between them); held that the best evidence of the fact could only be given by the defendants' officer, who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence. *Williams v. The East India Company*, M. 43 Geo. 3. Page 192

3. No action will lie for *not preventing* but *permitting and suffering* the plaintiff to be arrested, after payment of debt and costs owing to the defendant, upon a writ sued out before such payment. Malice is the gist of all actions for injuries of that nature. Page v. *Wiple*, H. 43 G. 3. 314
4. In an action against the hundred on the stat. 9 G. i. c. 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condition that the party grieved should within the time limited give in his examination upon oath before a magistrate whether

Q q 2

whether or not he knew the offender or offenders, or any of them; and an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, is not sufficient within the statute, still less in support of an averment in the declaration that he gave in such examination, &c. in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders, if there were several. *Thurteill v. The Inhabitants of the Hundred of Musford and Loshin, land, in the county of Suffolk.* H 43 G. 3. Page 400

5. Where one accidentally drove his carriage against another's, the remedy is *trespass* and not *case*; the injury being immediate from the act done; though he were no otherwise blameable than by driving on the wrong side of the road in a dark night. The distinction is, that where the injury is immediate from an act of force by the defendant, the remedy is in *trespass*; where the injury is only consequential to an act before done by the defendant, there an action on the case lies. *Leame v. Bray.* B. 43 G. 3. 593

ACT OF GOD.

See CONDITION, No. 1.

ADMINISTRATOR, EXECUTOR, &c.

1. Where the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in *scire facias*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a devassavit: held that the executors being fixed conclusively with assets by such latter judgment, the issue, upon *non detinet*, lay upon them to prove the due administration of such assets, otherwise the plaintiff was entitled to recover. *Hope v. Bague and another.* M 43 G. 3. 2
2. A declaration against an executor suggesting a *devassavit*, brought in the

detinet only, is at any rate cured by verdict. But semble, that independent of the verdict the plaintiff on such a declaration may take judgment de bonis testatoris. Page 2

3. A count in assumpsit to the plaintiff as *executrix*, for money paid by her to the defendant's use, may be joined with another count on promises made to the testator: for, non constat but that she may have been compelled to pay the money upon an obligation by the testator as surety for the defendant to a creditor; in which case the law would raise an assumpsit in him to reimburse the testator's estate, and the money so recovered by the executrix would be assets. *Ord v. Fenwick, Executrix, &c. in Error.* M 43 G. 3. 104
4. An action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe on the demise of Lord Saye and Sele v. Guy.* M 43 G. 3. 120
5. Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the statute of limitations was pleaded. *Sarell, Administrator, &c. v. Wine.* H 43 G. 3. 4-9

AFFIDAVIT.

See AFFIDAVIT TO HOLD TO BAIL.

AFFIDAVIT TO HOLD TO BAIL.

1. In an affidavit to hold to bail for 16*l.* and upwards, it is not sufficient to negative a tender in bank notes of the said sum of 16*l.* and upwards; though if the negative had been of such tender of the said sum only, that would be taken to refer to the specific sum mentioned which might be so tendered. *Ford v. Lover.* M. 43 G. 3. 110
2. A foreigner whose general residence is abroad, and who only landed here for a temporary purpose, viz to make an affidavit to hold the defendant to bail, may properly describe his place of abode

abode to be in his own country, and not at the place where the affidavit was sworn, within the meaning of the rule of court, *Mich. 15 Car 2. Bouet v. Kutoe, M. 43 G. 3. Page 154*

3. One who became surety for the defendant before his discharge under an insolvent-debtor's act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c. for the old debt, cannot thereupon hold the defendant to bail by an affidavit as for so much money paid to his use. *Taylor v. Higgins, M. 43 G. 3. 169*

4. One who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause of action in substance; the first affidavit to hold to bail being adapted to a demand in trover for goods, and the second for money had and received upon a supposition that the goods had been sold by the defendant for the plaintiff, and the money received to his use. *Imlay v. Edelsen, H. 43 G. 3. 309*

AGREEMENT.

1. An executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception in the stamp acts in favour of agreements, &c. for or relating to the sale of goods. *Buxton v. Bedal, H. 43 G. 3. 303*

2. A parish cannot discharge themselves by any agreement with others from a liability to do act required of them by law. *Rex v. The Mayor, &c. of Liverpool, M. 43 G. 3. 86*

ANNUITY.

1. Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration-money paid for it, the grantor may, under a plea of set off, set off the payments made in respect of such annuity, though for more than six years, unless

the plaintiff reply the statute of limitations. *Hicks v. Hicks, M. 43 G. 3. Page 16*

2. The first part of a memorial of an annuity stating a bond, by which certain persons became bound to the grantee, may be explained by a subsequent part setting forth another bond, in which the first is recited as a joint and several bond; such recital not being inconsistent with the preceding allegation, but only explaining what was before left short in the description of the first bond. *Coare v. Giblett, E. 43 G. 3. 461*

3. Where a memorial of an annuity omitted to register certain bonds, whereby the grantor for whose life the annuity was granted bound himself to pay the grantee a certain sum if he went abroad in a military capacity during three several years following the grant of the annuity: held that the annuity was thereby vacated; and the Court thereupon set aside the warrant of attorney and judgment given amongst other instruments for securing the annuity. *Chawner v. Whaley, E. 43 G. 3. 500*

4. A deed for securing an annuity containing a stipulation that the trustee should permit the grantor to take the rents and profits until default in the payment of the annuity, and that in case the annuity should be in arrear for sixty days, the trustees might enter and raise sufficient to satisfy it, and suffer the grantor to take the overplus from time to time, is not satisfied by a memorial only describing such deed as containing the usual powers of entry and distress, and perception of the rents and profits of the premises, for better securing and enforcing the payment of the annuity. *Des Enfants v. O'Brien, E. 43 G. 3. 559*

APPEAL.

1. By s. 19. of stat. 13 G. 3. c. 78. where an order of justices has been made for stopping up a road, an appeal is given to the "the party grieved by" any such order or proceeding at the "next Quarter Sessions after such order made or proceedings had," &c.: held, that the appeal must be made to the

Quarter Sessions *next after the order made*, without reference to any notice received by the appellant of such order. *Rex v. the Justices of Staffordshire. M. 43 G. 3. Page 151*

2. If upon an appeal lodged against an order of removal the Sessions are of opinion that reasonable notice has not been given by the appellant to the respondent parish, they cannot dismiss the appeal on the ground that notice might have been given, in time, but are bound by the direction of the stat. 19 G. 2. c. 7. s. 8. to adjourn the appeal to the next sessions. *Rex v. The Justices of Buckinghamshire, H. 43 G. 3. 342*

ARBITRATION.

See AWARD.

ARREST.

1. A defendant in a cause, attending an arbitrator to be examined as a witness under a rule of Court, is privileged from arrest, *cundo, morando, et redeundo. Spence v. Stuart, Bart. M. 43 G. 3. 89*
2. No action will lie for *not preventing* but *permitting and suffering* the plaintiff to be arrested, after payment of debt and costs owing to the defendant, upon a writ sued out before such payment. Malice is the gist of all actions for injuries of that nature. *Page v. Wiple, H. 43 G. 3. 314*

ASSETS.

See ADMINISTRATOR, &c. No. 3.

ASSUMPSIT.

See ANNUITY, No. 1.

1. The defendants gave the plaintiff their own bills, accepted by third persons, in exchange for acceptances of other bills drawn by them on him; the different sets of which tallied in the gross amount, except a few shillings in one instance which was paid at the time, in order, as it was expressed, *to finish the transaction*; and except that in two instances out of five the acceptances so given by the defendants were made

payable two days before the counter-acceptances of the plaintiff: but no stress was laid at the time on these trifling differences. Held that the transaction being that of an *absolute exchange* of securities, each party was confined to his remedy on those securities, and that the law would not raise an implied promise in the defendants, who had become bankrupts, to re-pay to the plaintiff the amount on the balance of his acceptances paid after such bankruptcy. *Buckler v. Buttivant and White, M. 43 G. 3. Page 72*

2. A count in assumpsit to the plaintiff *as executrix*, for money paid by her to the defendant's use, may be joined with another count on promises made to the testator: for non constat but that she might have been compelled to pay the money upon an obligation by the testator as surety for the defendant to a creditor, in which case the law would raise an assumpsit in him to reimburse the testator's estate; and the money so recovered by the executrix would be assets. *Ord v. Fenwick, Executrix in Error. M. 43 G. 3. 104*
3. Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant, (the acceptor,) who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of indorsee: held that the bill being proveable as a debt under the defendant's commission, and their being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant who had obtained his certificate. *Houle v. Banter, M. 43 G. 3. 177*
4. Where credit was given by insurance brokers in an account delivered in by them to an underwriter for the premiums of re-assurances, declared illegal by the stat. 19 G. 2. c. 37. after which the assured gave notice to the brokers

not to pay the money over to the underwriter, and indemnified them for withholding it: held that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal, and the money not having been actually paid, but only credit given for it on account. *Edgar and another, Assignees of Carden, a Bankrupt v. Fowler*, H. 43 G. 3. Page 222

5. A garnishee, against whom a recovery was had in the mayor's court in foreign attachment after a summons to the defendant there, and nihil returned, may protect himself by giving such proceedings in evidence upon non assumpsit in an action to recover the same debt brought by the defendant below; without proving the debt of the plaintiff below, who attached the money in his hands: although by the course of proceedings in the mayor's court bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M^d Daniel v. Hughes*, H. 43 G. 3. 367

AUCTION.

1. Where the agent of the owner at an auction for the sale of an estate put it up in so many lots at certain prices, and no person bidding for the same, he put it up again in fewer lots at other certain prices, and still no person bidding, he put it up all together in one lot, at a certain price; and on no persons bidding, the estate was withdrawn from sale: held that this is not a bidding of the owner by an agent, so as to subject the party to the auction duty for want of a notice in writing to the auctioneer (previous to the auction) of such agency as required by stat. 19 G. 3. c. 56. and 23 G. 3. c. 37. in order to excuse the owner from the payment of the auction duty. *Cruick v. Crisp*, H. 43 G. 3. 337

AWARD.

1. Where the lessor of the plaintiff and the defendant in ejectment had before

referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment. *Doe d. Morris and another v. P offer*, M. 43 G. 3. Page 15

2. If an arbitrator profess to decide upon the law, and he mistake it, the Court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the Court. *Kent v. Elstob, and others*, M. 43 G. 3. 18
3. The Court have jurisdiction in the case of an award under the stat. 9 & 10 W. 3. c. 15, though the submission bond were to make the award a rule of Court, instead of the submission. *Pedley v. Westmacot*, E. 43 G. 3. 603

BAIL.

See AFFIDAVIT TO HOLD TO BAIL. PRACTICE, No. 15.

1. Time enlarged for bail to surrender a bankrupt under examination. *Maude v. Fouett*, M. 43 G. 3. 45
2. B. R. have power to bail in discretion in all cases of felony, as well as other offences. *Rex v. Marks*, M. 43 G. 3. 163
3. One, who was committed to Newgate by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by habeas corpus issued on the crown side of the court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment pro forma to the marshal, and his recommitment to Newgate charged with the several matters. *Taylor's case*, H. 43 G. 3. 222
4. Where, after due notice of render of the principal, the plaintiff still proceeds against the bail in the action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings

ings in the action against them on payment of costs; held the subsequent proceedings irregular, being contrary to the rule of court. *Trin. 1 Ann.* which says that on such notice of render all further proceedings against the bail shall cease. *Byrne v. Aguilar*, *H. 43 G. 3.*

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5. One who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause of action in substance; the first affidavit to hold to bail being adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by the defendant for the plaintiff, and the money received to his use. *Imley v. Ellefsen*, *H. 43 G. 3.*

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6. Upon a writ of error sued out by the principal after the bail are fixed, and proceedings against them in scire facias, the Court will only stay proceedings against the bail pending the writ of error on the terms of the bail's undertaking to pay the condemnation money, and the costs of the scire facias; and, (if it be a case in which there is no bail in error,) to pay the costs also of the writ of error if judgment should be affirmed. *Buchanan v. Alders and another*, *E. 43 G. 3.*

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7. If the second writ of scire facias be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the scire facias book in the sheriff's office, which is merely a private book for his own convenience. *Heyward v. Rennard and another*, *E. 43 G. 3.*

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BANKRUPT.

See ASSUMPSIT, No. 1. BAIL, No. 3. BILLS OF EXCHANGE, § 4. No. 1. STOPPING IN TRANSITU.

1. In an action by the assignee of a bond given to the Lord Chancellor by the petitioning creditor of a bankrupt under the stat. 5 G. 2 c. 30. f. 23. (and which was assigned by the Lord Chan-

cellor to a creditor of the bankrupt, on the ground of the commission having been sued out fraudulently); wherein the defendant by his plea set forth the Lord Chancellor's order for the assignment; whereby it appeared that he had previously ordered a certain sum, received by the defendant of the bankrupt, to be refunded, and further ordered the bond to be assigned to the plaintiff, and the costs of the petition to be paid by the defendant; and then the plea averred payment before the suing out of the plaintiff's writ of the particular sum mentioned, and the costs, in satisfaction of the damages sustained by the bankrupt's estate; and that neither the plaintiff nor the bankrupt's estate had sustained any other damage *ultra* the sums so paid to the plaintiff: held such plea to be no answer to the action; for by such order of the Lord Chancellor must be understood that the whole penalty of the bond was assigned to the plaintiff as creditor and assignee of the estate under a second commission, (and the party grieved by the first fraudulent commission), by way of satisfaction in damages for the injury sustained. But it was also considered to be competent to the Lord Chancellor to review the former order, even after judgment for the plaintiff for the whole penalty, and to direct the whole or any part of such penalty to be applied accordingly. *Smithy v. Edmonson*, *M. 43 G. 3. Page 22*

2. It seems that such a bond is not within the stat. 8 & 9 W. 1. c. 11. f. 8. by which a jury is to assess damages; because by the stat. 5 G. 2 c. 30. the damages are to be ascertained by the Lord Chancellor; although he may assist his conscience by directing an inquiry before a Master or an issue at law. *ib.*

3. Time enlarged for bail to surrender a bankrupt under examination. *Mauds v. Jowett*, *M. 43 G. 3.*

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4. Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant, (the acceptor,) who had himself no consideration at the time for such acceptance; and the day before

before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee: held that the bill being proveable as a debt under the defendant's commission, and there being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant, who had obtained his certificate. *Houle v. Baxter*, M. 43 G. 3.

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5. One who had committed a secret act of bankruptcy procures the defendant to lend him his acceptance, and as a security pledges the lease of his house; and having drawn the bill payable to his own order, indorses it to the plaintiff for a valuable consideration, without notice of his bankruptcy: held that, in an action by the plaintiff, as indorsee, against the acceptor, the latter could not defend himself on the ground of the drawer's bankruptcy at the time of such indorsement, or because the assignees had withdrawn from him the lease deposited as a security. *Arden v. Watkins*, H. 43 G. 3.

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6. Where time is to be computed from an act done, the day on which such act is done is to be included in the computation. Therefore, where the stat. 21 Jac. 1. c. 19. s. 2. enacts that a trader lying in prison two months (i. e. two lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest. *Glasfington and others, Assignees of Dickey a Bankrupt, v. Rawlins*, H. 43 G. 3.

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BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY—ORDER OF.

See ORDER OF JUSTICES.

BILLS OF EXCHANGE, &c.

1. The defendants gave the plaintiff their own bills, accepted by third persons,

in exchange for acceptances of other bills drawn by them on him, the different sets of which tallied in the gross amount; except a few shillings in one instance which was paid at the time, in order, as it was expressed, *to finish the transaction*; and except that in two instances out of five the acceptances so given by the defendants were made payable two days before the counter-acceptances of the plaintiff, but no stress was laid at the time on these trifling differences. Held that the transaction being that of an *absolute exchange* of securities, each party was confined to his remedy on those securities, and that the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff the amount on the balance of his acceptances paid after such bankruptcy. *Buckler v. Buttivant and White*, M. 43 G. 3. Page 72

2. Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant, (the acceptor,) who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee: held that the bill being proveable as a debt under the defendants' commission, and there being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant who had obtained his certificate. *Houle v. Baxter*, M. 43 G. 3.

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3. One who had committed a secret act of bankruptcy procures the defendant to lend him his acceptance, and as a security pledges the lease of his house; and having drawn the bill payable to his own order, indorses it to the plaintiff for a valuable consideration, without notice of his bankruptcy: held that, in an action by the plaintiff, as indorsee, against the acceptor, the latter could

not defend himself on the ground of the drawer's bankruptcy at the time of such indorsement, or because the assignees had withdrawn from him the lease deposited as a security for his acceptance. *Arden v. Watkins*, H. 43 G. 3. Page 317

4. An action lies by the indorsee against the indorser upon a bill of exchange immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. *Ballingalls v. Gloster*, E. 43 G. 3. 481

BOND.

See ANNUITY, No. 2. HUSBAND AND WIFE.

1. In an action by the assignees of a bond given to the Lord Chancellor by the petitioning creditor of a bankrupt under the stat. 5 G. 2. c. 30. s. 23. (and which was assigned by the Lord Chancellor to the creditor of the bankrupt on the ground of the commission having been sued out fraudulently,) wherein the defendant by his plea set forth the Lord Chancellor's order for the assignment; whereby it appeared that he had previously ordered a certain sum received by the defendant of the bankrupt to be refunded, and further ordered the bond to be assigned to the plaintiff, and the costs of the petition to be paid by the defendant; and then the plea averred payment before the suing out of the plaintiff's writ of the particular sum mentioned and the costs, in satisfaction of the damages sustained by the bankrupt's estate; and that neither the plaintiff or the bankrupt's estate had sustained any other damage *ultra* the sums so paid to the plaintiff: held such plea to be no answer to the action; for by such order of the Lord Chancellor must be understood, that the whole penalty of the bond was assigned to the plaintiff, as creditor and assignee of the estate under a second commission, (and therefore a party grieved by the first fraudulent commission), by way of satisfaction in damages for the injury sustained. But it was also considered to be competent to the Lord

Chancellor to review his former order, even after judgment for the plaintiff for the whole penalty, and to direct the whole or any part of such penalty to be applied accordingly. *Smithy v. Edmonson*, M. 43 G. 3. Page 22

2. It seems that such a bond is not within the stat. 8 & 9 W. 3. c. 11. s. 8. by which a jury is to assess damages; because by the stat. 5 G. 2. c. 30. the damages are to be ascertained by the Lord Chancellor; although he may assist his conscience by directing an inquiry before a Master, or an issue at law. *ib.*
3. The husband having taken a bond conditioned to pay his wife an annuity by the obligor, the latter cannot without the assent of the husband agree with the wife to discharge himself from future payments of the annuity for a certain period in consideration of his discharging certain debts of the husband; but the husband may notwithstanding sue for the arrears of the annuity when due. *Brown v. John Benson*, H. 43 G. 3. 331
4. Where a bond by A, reciting that B. intended to open a banking account with C., D., and E. as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking-house of C., D., and E.: held that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation. *Strange and others, surviving Partners of Walsby v. Lee*, E. 43 G. 3. 484

BRIBERY.

See WITNESS, No. 4.

BURNING.

The burning of a mill-house, not parcel of any dwelling-house, is not felony within the stat. 9 G. 1. c. 22. which gives a remedy to the party grieved against the

the hundred, though within the stat. 9 G. 3. which omits the remedial clause. *Hiles v. The Inhabitants of the Hundred of Shrewsbury*, E 43 G. 3. Page 457

BY-LAW.

A by-law altering the qualification of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom, by a certain servitude, is not warranted by a custom of such body, which claimed by prescription to make by-laws regulating the number of persons to be taken as apprentices. *Rex v. Tappenden*, M. 43 G. 3. 186

CASES explained, questioned, or denied.

<i>Doson v. Sandford</i>	-	-	69
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<i>Israel v. Douglas</i>	-	-	171

CHALLENGE.

See DUELLING.

CHARTER-PARTY.

1. Where a charter-party of affreightment provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable: held that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson v. Schank*, Hil. 43 G. 3. 233
2. A trader in England charters a ship on certain conditions for a voyage to Russia, and to bring goods home from his correspondent there, who accord-

ingly ships the goods on account and at the risk of the freighter, and sends him the invoices and bills of lading of the cargo: held that the delivery of the goods on board such chartered ship does not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. And a demand of the goods having been made by the agent of the consignor, upon the captain, before they were unloaded; after which he delivered them to the assignees of the vendee: held that the consignor might maintain trover against the assignees. *Bohtlingk and others v. Inglis and others, Assignees of Crane, a Bankrupt*, H. 43 G. 3. Page 381

CHURCH.

1. Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, to the granting of which the rector dissented, notwithstanding which the court below were proceeding to grant the faculty with the consent of the ordinary: held to be no ground for a prohibition, but mere matter of appeal if the rector's reasons for dissenting were improperly over-ruled. *Bulwer, Clerk, v. Hase*, H. 43 G. 3. 217

COALS.

1. In March 1802 the statute 3 G. 2. c. 26 s. 13. giving a penalty against dealers in coals within the metropolis and ten miles round for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the stat. 12 Ann. s. 2. c. 17. s. 11. was a subsisting law: and held that evidence of such coals proving short upon re-measurement was admissible to prove the charge of thier not having been justly measured. But Qu. Whether the

the statute 3 G. 2. c. 26. were a subsisting law after July 1802, when the stat. 26 G. 2. c. 108. was revived by the stat. 42 G. 3. c. 89? *Warren v. W. v. Windie, H. 43 G. 3.*

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2. A dealer in coals by the chaldron who sold to another by the chaldron a certain quantity as and for 10 chaldrons of coals pool measure, without justly measuring the same with the lawful bushel of Queen Anne, is liable to the penalty of 50l. imposed by the 13th sect. of the stat. 3 Geo. 2. c. 26. upon such defaulters who sell coals by the chaldron or lesser quantity without measuring them. *Parish qui tam v. Thompson, E. 43 G. 3.*

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COMMITMENT.

Though a warrant of commitment for felony be informal, yet if the corpus delicti appear in the depositions returned to the court, they will not bail but remand the prisoners. *Rex v. George Marks and others, M. 43 G. 3.*

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And this is now done by making out a new and regular warrant of commitment. *ib.*

CONDITION.

1. Where a charter-party of affreightment provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable: held that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson v. Schank and others, H. 43 G. 3.*
2. In an action against the hundred on the stat. 9 G. 1. c. 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condi-

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tion that the party grieved should, within the time limited, give in his examination upon oath before a magistrate, whether or not he knew the offender or offenders, or any of them: and an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c. in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders if there were several. *Thurtell v. the Inhabitants of the Hundred of Musford and Lothingland in the County of Suffolk, H. 43 G. 3.*

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CONSIGNOR AND CONSIGNEE.

See STOPPING IN TRANSITU.

1. Where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c. be paying freight for the said goods according to charter-party; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo: held that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be devolved by the consignor's right to stop the goods in transitu in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated;

pulated; held that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. *Walley v Montgomery*, E. 43 G. 3. Page 585

CONVICTION.

1. A conviction on the 4th sect. of the stat. 5 Ann. c. 14. for keeping a dog and gun to kill game, without being qualified, must be made within three months after the offence committed: and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad. *Rex v. Tolley*, E 43 G. 3. 467
2. One may be convicted on the stat. 21 G. 3. c. 57. as the driver of a stage coach, for permitting and suffering beyond the proper number of persons to go upon the roof of it; although he be not stated to be a driver employed by the owner, and although he did not appear when summoned before the magistrate; in which case the 2d sect. of the act directs that the owner shall be liable to the penalty thereby laid on such driver. *Rex v. Barker*, E. 43 G. 3. 504

COPYHOLD.

Under a grant by copy of court-roll of a reversionary estate to A. (who had before a life-estate in the premises) *habendum to him for the lives of B and C.*, his grandsons, during the life of either of them longest living, successively, according to the custom, &c. relerving a heriot and 6s. rent; A. alone takes the legal estate in reversion, and not the cestuy que vies; there being no custom to enable them to take; although they were stated to be admitted tenants in reversion.

And though in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the cestuy que vies to enter as tenant upon the death of his grandfather, and received the 6s. rent from him till his death; yet he not dying seised of the

legal estate, his widow could not claim her free bench according to the custom.

Nor did such receipt of rent from the cestuy qui vie constitute a tenancy from year to year so as to entitle his widow to notice to quit, the rent not being received as between landlord and tenant, but attributable to another consideration. *Right d. The Dean and Chapter of Wells v. Bawden*, H. 43 G. 3. Page 260

CORPORATION.

See BY-LAW, QUO WARRANTO, Information in Nature of.

The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself. *Rex v. Stewart*, *Rex v. Morris*, H. 43 G. 3. 213

COSTS.

1. The stats. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. §. 3. giving double costs to parish officers sued, &c. extend not to actions against them for non-feazance, such as the non-payment of money laid out for the support of one of their paupers by another parish into which he went; and for which an action of assumpsit was brought against them. *Atkins and others v. Banwell and another*, M. 43 G. 3. 92
2. No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question, Whether they were entitled to a general or limited probate? *Scammel and others v. Winkinson and another*, M. 43 G. 3. 202
3. Under the stat. 8 & 9 W. 3. c. 11. §. 4. it is discretionary in the judge before whom the trial is had to certify or not, according as it appears to him under the circumstances proved that the trespass was or was not wilful and malicious. And the judge having declined

clined to certify in a case where notice was given by the wife of the plaintiff to the defendant not to enter the locus in quo in his cart, there being no road there; notwithstanding which the defendant persisted in going on for the purpose of viewing more conveniently the turning in of some cattle in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant; on a justification pleaded, the court refused to interfere. *Good v. Watkins*, E. 43 G. 3. Page 495

COVENANT.

See CONDITION, No. 1.

1. One of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered: held such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact. *Drake, Clerk, v. Mitchell and others*, H. 43 G. 3. 251
2. The seller covenants to the purchaser of an estate that he shall enjoy and receive the rents, &c. without any action, &c. or interruption by the seller or those claiming from him, or by, through, or with his or their *a&ts, means, DEFAULT, &c.*: held that a breach was well assigned in respect of certain quit-rents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises. *Howes v. Brushfield*, E. 43 G. 3. 491

DEED.

See STAMP, No. 2.

DEVISE.

1. Where by the dubious use of the word *fami'y*. (viz. "brother and sister's *fami'y*,") in a will, the testator having had two sisters, one of whom was dead, leaving children, it could

not certainly be collected to what persons he meant to apply it; the heir at law is entitled to take. *Doe d. Hayter v. Joinville and others*, H. 43 G. 3. Page 172

2. One devises to his natural son, and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease, then for and amongst *such person and persons*, his and their heirs, &c. *as shall appear and can be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distribution have been entitled to his personal estate if he had died intestate*: held, that the distribution was to be made amongst those who were the testator's next of kin at the time of his death, though the nephew, to whom a prior life-estate was given, were one of them. *Doe d. Garner and Ballantine v. Lawson, and others*, H. 43 G. 3. 278
3. Where one seized in fee of real estate, by her will first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir at law for life, which, "together with the repairs during the term, should be considered as *his rent* for the said farm;" and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and devised "all the rest, residue, and remainder of her *EFFECTS* wheresoever and whatsoever, and of what nature, kind, or quality soever. (*except her wearing apparel and plate*) to certain nephews and nieces, to be equally divided between them by her executors:" held, that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir at law; although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenants for life. *Campfield v. Gilbert*, E. 43 G. 3. 516
4. Devise to a trustee to receive and pay the rents and profits for the maintenance of S. a feme covert, and the issue of her body, during her life, and after her decease, upon trust for the use of *the heirs of the body of S.*, their heirs

heirs and assigns for ever, *without regard to seniority of age or priority of birth*; and in default of such issue, to the use of the right heirs of the testatrix: held that S. took only an estate for life, and that the heirs of her body took as purchasers and as joint tenants; and therefore that the eldest son of S. dying in her life-time, his eldest son could not take either the whole as heir of the body of S., or a part as heir to his father *Doe d. Hallen v. Ironmonger, E. 43 G. 3.* Page 533

5. Under a devise to A. for life, *without impeachment of waste*, and with a power of jointuring; remainder to the issue male of A.'s body and their heirs; and in default of such issue to B. for life, without impeachment of waste and with power of jointuring; remainder to the issue male of B.'s body and their heirs for ever: with a proviso, that in case A. or B. should become possessed of any other estate, and be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of his estates should go to the other of his nephews: remainder and residue of the testator's estate to A. in fee: held A. who had no child till after the death of the testator, took an estate tail under the first devise, and that a recovery suffered by him after the birth of a son was good. *Frank v. Stovin, E. 43 G. 3.* 548

6. One devised a rent-charge to his wife for life together with the interest of 1200*l.*; and after her decease devised the rent-charge to trustees and their heirs to sell and dispose of the same, and distribute the purchase-money amongst certain persons; and after giving a few small legacies, he directed his household goods, &c. to be sold; and the money arising from the sale of the rent-charge, and from his household goods, &c. *and from all other his estate and effects of what nature or kind soever and wheresoever*, he directed should be first liable to the payment of legacies, and the residue to be divided into certain parts, which he bequeathed to certain persons; with a proviso that the receipt of the trust-

tees to a purchaser of the rent-charge should be sufficient without seeing to the application of the purchase-money: and then he appointed the said trustees and his wife his executors. Held that the trustees did not take the legal estate in the real property of the testator. *Hilton v. Kenworthy, E. 43 G. 3.* Page 552

DUELLING.

If one kill another in a deliberate duel under provocation of charges against his character and conduct however grievous, it is murder in him and in his second, and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. *R. v. Rice, E. 43 G. 3.* 581

ELY—ISLE OF.

A writ of fieri facias, directed in the first instance to the bailiff of the Isle of Ely out of B. R. is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. The bishop of Ely has not a palatine jurisdiction within the isle, though exercising jura regalia there. Process issued out of the courts at Westminster into the isle, goes in the first instance to the sheriff of Cambridge-shire, who thereupon issues his mandate to the bailiff of the franchise. *Grant v. Bagge and others, M. 43 G. 3.* 128

EJECTMENT.

See AWARD, NO. I. COPYHOLD.

Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. *Thunder d. Weaver v. Belcher, E. 43 G. 3.* 449

ESTOPPEL.

If a verdict be found on any fact or title, distinctly put in issue in an action of trespass,

trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. *Ouram v. Morwood*, H. 43 G. 3. Page 346

EVIDENCE.

See INSURANCE, No. 3.

1. Where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment. *Doe d. Morris and others v. Roffer*, M. 43 G. 3. 15
2. Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity, (by which a loss happened,) *without due notice* to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship, (which first mate was dead, and no other person was present to depose to the conversation which passed between them;) held that the best evidence of the fact could only be given by the defendants' officer, who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence. *Williams v. The East India Company*, M. 43 G. 3. 192
3. In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed there-

to is the seal of the court. *Henry v. Adey*, H. 43 G. 3. Page 221

4. A garnishee against whom a recovery was had in the mayor's court on foreign attachment, after a summons to the defendant and nihil returned, may protect himself by giving such proceedings in evidence upon non assumpsit, in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below, who attached the money in his hands: although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M^c Daniel v. Hughes*, H. 43 G. 3. 367
5. Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator laying the promise to be made to his intestate, to which the statute of limitations was pleaded. *Sarrell, Administrator, &c. v. Wine*, H. 43 G. 3. 409

EXTINGUISHMENT.

See COVENANT, No. 1. OF ACCORD AND SATISFACTION, No. 1.

FACTOR.

See STOPPING IN TRANSITU.

FACULTY.

See PROHIBITION, No. 1.

FARM-BUILDINGS, &c.

See LANDLORD AND TENANT, No. 1.

FEME COVERT, TRUST.

See SETTLEMENT BY ESTATE, No. 1.

FIXTURES.

A tenant in agriculture who erected at his own expence, and for the more necessary and convenient occupation of his

his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former: that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine: but where it is accessory to the realty it can in no case be removed. *Elwes v. Maw*, M. 43 G. 3. Page 38

FOREIGN ATTACHMENT.

A garnishee, against whom a recovery was had in the mayor's court on foreign attachment, after a summons to the defendant and nihil returned, may protect himself by giving such proceedings in evidence upon non assumpsit in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands: although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M'Daniel v. Hughes*, H. 43 G. 3. 367

FOREIGN JUDGMENT.

In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the court. *Henry v. Adey*, H. 43 G. 3. 221

GAME.

See CONVICTION, No. 1.

GRANT.

See COPYHOLD. WAY, No. 1.

A lease for a year being made between A. and B. the release, stating B to be a trustee for C., granted the premises unto C. in his possession being, by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, *habendum* to B and his heirs, to such uses as C. should appoint: held the release sufficient to convey the premises to B, and the words in the granting part "unto C." &c. may be rejected as surplusage. *Spyve v. Topham*, M. 43 G. 3. Page 115

HABENDUM.

See GRANT.

HIGHWAY.

See WAY.

1. Indictment for non-repair of a highway within certain limits, charging the corporation of Liverpool with a prescriptive liability to repair all common highways, &c. within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing, that the highway in question was not within any of the exceptions. *Rex v. the Mayor, &c. of Liverpool*, M. 43 G. 3. 86
2. A count stating the defendants' liability to arise by virtue of an agreement with the owners of houses along-side of the highway, is also bad; for the parish who are *prima facie* bound to the repair of all highways within their boundaries cannot be discharged from such liability by any agreement with others. *ib.*
3. By s. 19. of stat. 13 G. 3. c. 78. where an order of justices has been made for stopping up a road, an appeal is given to "the party grieved by" "any such order or proceeding at the" "next Quarter Sessions after such order" "made or proceedings had," &c.: held that the appeal must be made to the Quarter Sessions next after the order made, without reference to any notice received by the appellant of such order.

Rex v. the Justices of Staffordshire. M.
43 G. 3. Page 151

HOMICIDE.

See DUELLING.

HUNDRED — ACTION
AGAINST.

1. In an action against the hundred on the stat. 9 G. 1. c. 22. for damage sustained by the wilful burning of the party's bars, it is a precedent condition that the party grieved should, within the time limited, give in his examination upon oath before a magistrate, whether or not he *knew* the offender or offenders, or *any of them*; and an examination on oath, in which the party only swore that he *suspected* that the fact was done by *some person or persons to him unknown*, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c. *in and by which it appeared* that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders if there were several. *Iburtell v. the Inhabitants of the Hundred of Mustford and Lothingland in the County of Suffolk, H. 43 G. 3.* 400
2. The burning of a *mill-house*, not parcel of any dwelling-house, is not felony within the stat. 9 G. 1. c. 22. which gives a remedy to the party grieved against the hundred, though within the stat. 9 G. 3. which omits the remedial clause. *Hiles v. The Inhabitants of the Hundred of Shrewsbury, E. 43 G. 3.* 457

HUSBAND AND WIFE.

The husband having taken a bond conditioned to pay his wife an annuity by the obligor, the latter cannot without the assent of the husband agree with the wife to discharge himself from future payments of the annuity for a certain period in consideration of his discharging certain debts of the husband; but the husband may notwith-

standing sue for the arrears of the annuity when due. *Brown v. John Benson, H. 43 G. 3.* Page 331

INDICTMENT.

See DUELLING.

1. Indictment for non-repair of a highway within certain limits, charging the corporation of *Liverpool* with a prescriptive liability to repair all common highways, &c. within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing that the highway in question was not within any of the exceptions. *Rex v. the Mayor, &c. of Liverpool, M. 43 G. 3.* 86
2. A count, stating the defendants' liability to arise by virtue of an agreement with the owner of houses alongside of the way, is also bad: for the parish who are *prima facie* bound to the repair of all highways within their boundaries cannot be discharged from such liability by any agreement with others. *ib.*
3. It seems that persons putting on board a ship an unknown article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, is guilty of a misdemeanor. *Williams v. The East India Company, M. 43 G. 3.* 201

INQUIRY—WRIT OF.

See BOND, No. 1.

INSURANCE.

1. Where credit was given by insurance brokers in an account delivered in by them to an underwriter for the premiums of re-assurances, declared illegal by the stat. 19 G. 2. c. 37. after which the assured gave notice to the brokers not to pay the money over to the underwriter, and indemnified them for withholding it: held that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal.

gal, and the money not having been actually paid, but only credit given for it in account. *Edgar and another, Assignees of Carden, a Bankrupt v. Fowler*, H. 43 G. 3. Page 222

2. Under a policy of insurance on goods from A. to B, C, and D., the risk attached where the ship, which was captured before the dividing point, sailed with intention to proceed directly to D., without first visiting the intermediate places. Though under such a policy, if a ship mean to go to more than one of the places so named, she must visit them in the order in which they stand in the policy. *Marsden v. Reid*, E. 43 G. 3. 572

3. How far a representation made to one underwriter on a policy shall be taken to extend to subsequent underwriters, and what shall be evidence of it, *vi. ib.*

INVOICE.

See CONSIGNOR and CONSIGNEE.

JEOFAILS—STATUTE OF.

See PLEADING, No. 2.

JOINDER IN ACTION.

See PLEADING, No. 3, 4.

KIN—NEXT OF.

See DEVISE, No. 2.

LANDLORD AND TENANT.

1. A tenant in agriculture, who erected at his own expence, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the

former: that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine: but where it is accessory to the reality, it can in no case be removed. *Elwes v. Maw*, M. 43 G. 3. Page 8

2. The receipt from the cestuy qui vie of a quit rent reserved on the grant of a copyhold does not constitute a tenancy from year to year, so as to entitle his widow to notice to quit; the rent not being received as between landlord and tenant, but attributable to another consideration. *Ridg d. The Dean and Chapter of Wells v. Barnden*, H. 43 G. 3. 260

LEATHER-SEARCHERS.

The stat. 1 Jac. 1. c. 22. s. 40., which gives a penalty of 5*l.* against any person resisting the searchers appointed by that act, in searching for and seizing goods made of leather ill-tanned or wrought, does not attach upon a tradesman who purchases such goods ready made, though with intent to sell again, but only upon the original makers of such ill-wrought goods. *Mason q. t. v. Middleton*, H. 43 G. 3. 334

LEGACY.

An action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe on the demise of Lord Saye and Sele v. Gye*, M. 43 G. 3. 120

LIMITATION OF TIME.

See SET-OFF, No. 1.

Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above 20 years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 26 years, as all former ways were at that time extinguished by the operation of an inclosure act. *Campbell v. Wilson*, H. 43 G. 3. 294

MANDAMUS.

See APPEAL, No. 2.

LIMITATION—STATUTE OF.

Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the statute of limitations was pleaded. *Sarrell, Administrator, &c. v. Wine, H. 43 G. 3. Page 409*

MARKET.

The lord of a manor, to whom the grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*; and whether *villa* extend to the town of *W.* or the township or parish of *W.*, the lord has a right to remove the market-place from one situation to another within the precinct of his grant. And though he should have holden it for above 20 years within the township of *W.*, where the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord. *Gurwen v. Salkeld, E. 43 G. 3. 538*

MASTER AND SERVANT.

See POOR-REMOVAL. PRINCIPAL AND AGENT.

MISNOMER.

The defendant being sued by the name of "*Jonathan otherwise John Soans*," is no cause of demurrer to the declaration; for, non constat that it is not all one christian name. *Scott v. Soans, M. 43 G. 3. 111*

MONUMENT.

See PROHIBITION, No. 1.

MORTGAGE.

Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. *Thunder d. Weaver v. Belcher, E. 43 G. 3. Page 449*

MURDER.

See DUELLING.

NEW TRIAL.

It is no ground for the court to grant a new trial that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards v. Evans, E. 43 G. 3. 451*

NOTICE TO QUIT.

See LANDLORD AND TENANT, No. 2.

OATHS.

The unlawful administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the stat. 37 G. 3. c. 123., though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. *Rex v. George Marks and others, M. 43 G. 3. 157*

OBLIGATION.

See BOND.

ORDER OF JUSTICES.

Of Bastardy.

Every reasonable intendment will be made in favour of an order of Justices. Therefore where an order of bastardy, reciting that it had appeared to the justices on the oath of *R. T.* that the *said Mary Cole* (referring to the title in which she was named as *Mary Cole deceased*) was delivered of a bastard child, &c.; and further, that upon the examination of the said *M. C.* taken on oath, &c. dated, &c. in the presence of the said *R. T.*, the said *M. C.* upon her oath charged the defendant with being the father, &c. adjudged that therefore upon examination of the cause and circumstances of the premises, *as well on the oath of the said M. C.* before birth so taken, and also upon the oath of the said *R. T.* that the defendant was the father, and that he should pay so much, &c.; the Court will intend (especially after appeal confirmed the order) that *M. C.* was dead at the time of the order made, and that her examination on oath before taken in writing under the stat. 6 G. 2. c. 31. was verified on the oath of *R. T.* before the magistrates making the order; which examination is sufficient after the death of the mother to warrant a subsequent order of filiation. *Rex v. Clayton, M. 43 G. 3. Page 58*

ORDER OF REMOVAL.

See APPEAL. POOR REMOVAL.

OUTLAWRY.

In declaring against *A.* upon a joint contract by *A.* and *B.*, it is not enough to allege that *B.* was in due manner outlawed, without adding that he was outlawed in that suit. *Saunderson and another v. Hudson, M. 43 G. 3. 144*

PARISH-OFFICERS.

See COSTS, No. 1.

PARTNERS.

Where a bond by *A.*, reciting that *B.* intended to open a banking ac-

count with *C.*, *D.*, and *E.* as his bankers, was conditioned for payment to them of all sums from time to time advanced to *B.* at the banking-house of *C.*, *D.*, and *E.*; held that on *C.*'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that *B.*, who was indebted to the house at *C.*'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in *C.*'s lifetime, *A.* was wholly discharged from his obligation. *Strange and others, surviving Partners of Walwyn v. Lee, E. 43 G. 3. Page 484*

PAYMENT.

See ACCORD AND SATISFACTION, No. 1.

1. If one take the security of the agent of the principal with whom he dealt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged although the security fail. *Aliter*, if the principal do not shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time. *Wyatt v. The Marquis of Hertford, M. 43 G. 3. 147*
2. One who became surety for the defendant before his discharge under an insolvent debtors' act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c. for the old debt, cannot thereupon hold the defendant to bail by an affidavit as for so much money paid to his use. *Taylor v. Higgins, M. 43 G. 3. 169*
3. The husband having taken a bond conditioned to pay his wife an annuity by the obligor, the latter cannot without the assent of the husband agree with the wife to discharge himself from future payments of the annuity for a certain period in consideration of his discharging certain debts of the husband; but the husband may notwithstanding sue for the arrears of the annuity

annuity when due. *Brown v. Benson*,
H. 43 G. 3. Page 331

PEER.

See PRIVILEGE.

PLEADING.

See HUNDRED, No. 1.

INDICTMENT, No. 1, 2.

1. Where the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in *scire facias*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a *devastavit*: held that the executors being fixed conclusively with assets by such latter judgment, the issue, upon *non detinet*, lay upon them to prove the due administration of such assets, otherwise the plaintiff was entitled to recover. *Hope v. Bague and another*, M. 43 G. 3. 2
2. A declaration against an executor suggesting a *devastavit*, brought in the *detinet* only, is at any rate cured by verdict. But semble, that independent of the verdict the plaintiff on such a declaration may take judgment *de bonis testatoris*. *ib.*
3. In an action against three, wherein the plaintiff declared that *they* had the loading of a hoghead of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the *defendants* so negligently conducted themselves in the loading, &c. that the hoghead was damaged: held that the gist of the action was the *tort*, and not the *contract* out of which it arose; and therefore that on plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. *Gorvett v. Radnidge and others*, M. 43 Geo. 3. 62
4. A count in assumpsit to the plaintiff as executrix, for money paid by her to the defendant's use, may be joined with another count on promises made to the testator: for non constat but that she may have been compelled to pay the

- money upon an obligation by the testator as surety for the defendant to a creditor, in which case the law would raise an assumpsit in him to reimburse the testator's estate; and the money so recovered by the executrix would be assets. *Ord v. Fenwick, Executrix, &c. in Error*. M. 43 G. 3. Page 104
5. The defendant being sued by the name of "*Jonathan otherwise John Soans*" is no cause of demurrer to the declaration; for non constat that it is not all one *christian* name. *Scott v. Soans*, M. 43 G. 3. 111
 6. In declaring against *A.* upon a joint contract by *A.* and *B.*, it is not enough to allege that *B.* was in due manner outlawed, without adding that he was outlawed in that suit. *Saunderson and another v. Hudson*, M. 43 G. 3. 144
 7. Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator laying the promise to be made to his intestate *Sarrell, Administrator, &c. v. Wine*, H. 43 G. 3. 409
 8. Where one accidentally drove his carriage against another's, the remedy is trespass and not case; the injury being immediate from the act done; though he were no otherwise blameable than by driving on the wrong side of the road in a dark night. The distinction is, that where the injury is immediate from an act of force by the defendant, the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, there an action on the case lies. *Leame v. Bray*, E. 43 G. 3. 593

POOR-RATE.

Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing amongst others

others a kitchen, wash-house, and coach-house, together with a stable, yard, and garden: held that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them beyond his necessary accommodation *as an officer* for the purpose of *public service*. *Rex v. Terratt*, E. 43 G. 3. Page 506

POOR-REMOVAL.

1. A single woman living in service with her master is not removeable even since the stat. 35 Geo. 3. c. 101. s. 6. against the consent of herself and her master; though adjudged by the order of removal to be *with child*, and *therefore* chargeable to the parish in which she was serving; that statute not extending to make persons removeable, who were not proper objects of removal before, but only to leave certain descriptions of persons excepted out of the act liable to be removed, though not in fact chargeable, if otherwise proper objects of removal. *Rex v. The Inhabitants of Alveley* E. 43 G. 3. 563
2. *Semble*, a servant cannot be removed out of the service of his master. *H. & N. ib.* 568.

POWER.

1. Where in a marriage settlement made by tenant in tail, he settled the same to himself for life and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing attested by three witnesses and to be *inrolled*, with the consent in writing of certain trustees, to revoke the old and declare new uses: held that a deed of revocation executed by him and all the trustees in person except one, and the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustee, is bad, though properly attested and inrolled; and that another deed of re-

vocation properly executed and assented to, but *not inrolled till after the settlor's death*, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the lifetime of the person by whom it is to be executed; and also held that the defect of the one deed could not be supplied by the other. *Hawkins v. Kemp*, E. 43 G. 3. Page 410

PRACTICE.

1. It is not necessary to give a term's notice of trial after proceedings in the cause have been suspended for a year, if within the year the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient. *Richards v. Harris*, M. 43 G. 3. 1
2. A writ of latitat issued against a peer superseded on motion, grounded on an office copy of the precept, in which the defendant was styled Baron of W. *Cauche v. Lord Arundell*, M. 43 G. 3. 127
3. A judgment recovered by A. against B. and C. will not be set off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent debtor's act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe v. Darton*, M. 43 G. 3. 149
4. The service of process on a Sunday is absolutely void by the stat. 29 Car. 2. c. 7. s. 6. and cannot be made good by any subsequent waiver of the defendant, as by his not objecting till after a rule to plead given. *Taylor v. Phillips*, M. 43 G. 3. 155
5. If a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the court will not set aside the proceeding for irregularity merely on the ground that the defendant

never appeared, because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits. *Wakley qui tam v. Giles*, M. 43 G. 3. Page 167

6. The issue must be entered as of the term when the rule to reply was given and the similitur joined, and not as of the preceding term when the plea was pleaded. *Wood v. Miller*, M. 43 G. 3. 204

7. One, who was committed to *Newgate* by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by habeas corpus issued out of the crown side of the court, on which side also must be taken the subsequent rule for the surrender in the action, his commitment pro forma to the marshal, and his recommitment to *Newgate* charged with the several matters. *Taylor's case*, H. 43 G. 3. 232

8. Where, after due notice of render of the principal, the plaintiff still proceeds against the bail in the action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings in the action against them on payment of costs. held the subsequent proceedings irregular, being contrary to the rule of court. *Trin. 1 Ann.* which says that on such notice of render all further proceedings against the bail shall cease. *Byrne v. Aguilar*, H. 43 G. 2. 306

9. Where the cause of action substantially arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there where all the witnesses reside, at a great distance from the county where the venue is laid; the Court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact which in point of form exists in the original county. *Holmes v. Wainwright*, one, &c. H. 43 G. 3. 329

10. Taking out of the office a declaration by the by, which was delivered before any declaration in chief, is a waiver of the irregularity. *Archer v. Barnes*, H. 43 G. 3. Page 343

11. Upon a writ of error sued out by the principal after the bail are fixed, and proceedings against them in scire facias, the Court will only stay proceedings against the bail pending the writ of error on the terms of the bail's undertaking to pay the condemnation money, and the costs of the scire facias; and, (if it be a case in which there is no bail in error,) to pay the costs also of the writ of error if judgment should be affirmed. *Buchanan v. Alders and another*, E. 43 G. 3. 545

12. Notice of executing a writ of inquiry is in future to be given to the agent in town, and not to the attorney in the country. *Hayes v. Perkins*, E. 43 G. 3. 568

13. If the second writ of scire facias be in proper time upon the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the scire facias book in the sheriff's office, which is merely a private book for his own convenience. *Heyward v. Rennard and another*, E. 43 G. 3. 570

14. After a bail-bond taken and an attachment issued against the sheriff for not bringing in the body, the Court will relieve him on payment of what is due to the extent of the penalty in the bail bond, though less than the plaintiff's demand. *Rex v. The Sheriff of Middlesex*, E. 43 G. 3. 604

PREMIUM.

See INSURANCE, No. 1.

PRESUMPTION.

See WAY, No. 1.

Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the

the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity, (by which a loss happened,) *without due notice* to the captain or any person employed in the navigation, it lay upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship, (which first mate was dead, and no other person was present to depose to the conversation which passed between them;) held that the best evidence of the fact could only be given by the defendants' officer, who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence. *Williams v. The East India Company*, M. 43 G. 3. Page 192

PRINCIPAL AND AGENT.

If one take the security of the agent of the principal with whom he dealt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of the receipt, the principal is discharged although the security fail. *Aluer*, if the principal do not shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time. *Wyatt v. The Marquis of Hertford*, M. 43 G. 3. 147

PRISONER.

One, who was committed to *Newgate* by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by a habeas corpus issued on the crown side of the court, on which side also must be taken the subsequent rule for his surrender in the

action, his commitment pro forma to the marshal, and his re-commitment to *Newgate* charged with the several matters. *Taylor's Case*, H. 43 G. 3. Page 132

PRIVILEGE.

A writ of latitat issued against a peer, superseded on motion, grounded on an office copy of the precept in which the defendant was filed Bar on of *W. Couche v. Lord Arundel*, M. 43 G. 3. 127

PROCESS.

See PRIVILEGE.

1. A writ of fieri facias, directed in the first instance to the bailiff of the *Isle of Ely* out of this court, is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. The bishop of *Ely* has not a palatine jurisdiction within the isle, though exercising jura regalia there. Process issued out of the courts at *Westminster* into the isle, goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise. *Grant v. Bagge and others*, M. 43 G. 3. 128
2. The service of process on a *Sunday* is absolutely void by the stat. 29 Car. 2. c. 7. s. 6. and cannot be made good by any subsequent waiver of the defendant, as by his not objecting till after a rule to plead given. *Taylor v. Phillips*, M. 43 G. 3. 155
3. If a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the Court will not set aside the proceeding for irregularity merely on the ground that the defendant never appeared; because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits.

rite. Oakley qui tam v. Giler, M. 43
G. 3. Page 167

PROHIBITION.

See COSTS, No. 2.

1. Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, to the granting of which the rector dissented, notwithstanding which the court below were proceeding to grant the faculty with the consent of the ordinary: held to be no ground for a prohibition, but mere matter of appeal if the rector's reasons for dissenting were improperly over-ruled. *Bulwer, Clerk, v. Hise, H. 43 G. 3.* 217
2. After sentence in the ecclesiastical court in a matter of tithe, where the question turned upon the construction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, this Court directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question, whether supposing the court below to have misconstrued the act, a prohibition should go after sentence in a matter in which the court below had original jurisdiction, or whether it were only a ground of appeal? *Gare v. Gapper, Clerk, and Gold v. Gapper, Clerk, E. 43 G. 3.* 472

QUO WARRANTO—INFORMATION IN NATURE OF.

1. Where a corporation was dissolved, and no corporate body existed in fact at the time, the court refused to grant an information in nature of quo warranto against an individual for an impertinent claim to the returning officer at an election of members to serve in parliament, by virtue of his having been elected an alderman while the corporation existed in fact; there being no civil right in controversy, but it being rather the ground of a proceeding *in poenam* by the Attorney-

General. *Rex v. Saunders, M. 43*
G. 3. Page 119

2. It is no objection to the persons applying for an information in nature of a quo warranto, which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeached on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided. *Rex v. Morris and Stewart, H. 43 G. 3.* 213
3. The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself. *ib. 213*

RATE.

See POOR-RATE.

RE-ASSURANCE.

See INSURANCE, No. 1.

REMOVAL.

See POOR-REMOVAL.

REVOCATION.

See POWER.

SCHEDULE.

- A Schedule of goods referred to in a deed, to which it was annexed, must have the proper stamp by stat. 37 G. 3. c. 90. f. n. according to the number of words and sheets, and not merely the single schedule stamp of 2s. 6d. imposed by the first section of the act. *Lake and another v. Asbwell and others, Assignees of Wallis a Bankrupt, H. 43 G. 3.* 326

SESSIONS.

SETTLEMENT.

SESSIONS.

See APPEAL, No. 1.

SET-OFF.

1. Where the grantor of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration-money paid for it, the grantor may, under a plea of set off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks*, M. 43 G. 3. Page 16
2. A judgment recovered by A. against B. and C. will not be set-off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent debtors' act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe v. Darnton*, M. 43 G. 3. 149

SETTLEMENT.

— By Estate.

Where a pauper purchased a leasehold tenement for less than 30l., and afterwards conveyed the whole term to one, in trust to let the premises, and out of the rents and profits to repay himself 10l. advanced thereon, and then to apply the rents and profits to the separate use of the pauper's wife during her life, and afterwards to the pauper's own use for life if he survived her, and afterwards amongst their children: and the trustees suffered the pauper to continue to reside in the house above 40 days, till becoming chargeable to the parish he was removed: held that he gained no settlement by such residence; for he had no immediate interest remaining in him at the time, but at most a doubtful and contingent future interest; it being uncertain whether the 10l. would ever be paid off, and even if it were, that not giving him any right to reside upon the premises. *Rex*

STATUTES.

631

v. The Inhabitants of Tarrant Launceston, H. 43 G. 3. Page 226

— By taking a Tenement.

One who resided on a tenement of 5l. a year in the parish of W., and at the same time rented the ley (i. e. pasturage) of two cows from May-day to Michaelmas in certain land in H. at six guineas, thereby gains a settlement in W., though he were not entitled to the exclusive pasturage of the land in H. *Rex v. The Inhabitants of Hollington*, M. 43 G. 3. 113

SHERIFF.

See PROCESS, No. 1.

STAGE COACH.

See CONVICTION, No. 2.

STAMP.

1. An executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception in the stamp acts in favour of agreements, &c. *for or relating to the sale of goods*. *Buxton v. Bedal*, H. 43 G. 3. 303
2. A schedule of goods referred to in a deed, to which it was annexed, must have the proper deed stamp by stat. 37 G. 3. c. 90. s. 7. according to the number of words and sheets, and not merely the single schedule stamp of 2s. 6d. imposed by the first section of the act. *Lake and another v. Asbwell and others*, Assignees of Wallis a Bankrupt, H. 43 G. 3. 326

STATUTES.

Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed. *Warren & t. Sc. v. Windie*, H. 43 G. 3. 205

Hen.

Hen. 8.

27 <i>Hen. 8. c. 24.</i> (County palatine)	135
<i>Process</i>	137
33 <i>Hen. 8. c. 10.</i> (County palatine)	135

Elizabeth.

43 <i>Eliz. c. 2.</i> (Poor rate)	506
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James 1.

1 <i>Jac. 1. c. 22.</i> (Leather searchers)	334
7 <i>Jac. 1. 5</i> (Costs)	92
21 <i>Jac. 1. c. 12.</i> (Costs)	<i>ibid.</i>
<i>c. 19.</i> (Bankrupts)	407

Charles 2.

13 & 14 <i>Car. 2. c. 12.</i> (Settlement)	114
29 <i>Car. 2. c. 7.</i> (Process on Sunday)	155

William 3.

8 & 9 <i>W. 3. c. 11.</i> (Inquiry—Writ of)	22
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5 <i>Ann. c. 14.</i> (Game)	467
12 <i>Ann. st. 2. c. 17.</i> (Coal measure)	205

George 1.

7 <i>G. 1. c. 31.</i> (Bankrupts)	76
9 <i>G. 1. c. 7.</i> (Order of removal. Appeal)	342
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George 2.

2 <i>G. 2. c. 24.</i> (Bribery act)	451
3 <i>G. 2. c. 26.</i> (Coal measure)	205. 525
5 <i>G. 2. c. 30.</i> (Bankrupt. Bond)	22
6 <i>G. 2. c. 31.</i> (Order of filiation)	58
19 <i>G. 2. c. 37.</i> (Re-assurance)	222
31 <i>G. 2. c. 45.</i> (<i>Bermondsey</i> poor)	8

George 3.

9 <i>G. 3. c. 29.</i> (Burning mills)	457
13 <i>G. 3. c. 78.</i> (Highway act)	151
17 <i>G. 3. c. 26.</i> (Annuity act)	463.
	500. 555
19 <i>G. 3. c. 56.</i> (Auction duty)	337
23 <i>G. 3. c. 58.</i> (Stamp)	304
26 <i>G. 3. c. 108.</i> (Coal measure)	205
23 <i>G. 3. c. 37.</i> (Auction duty)	337

STOPPING IN TRANSITU.

31 <i>G. 3. c. 19.</i> (<i>Bermondsey</i> poor)	9
35 <i>G. 3. c. 101.</i> (Poor-removal)	563
37 <i>G. 3. c. 90.</i> (Stamp)	326
<i>c. 112.</i> (insolvent debtors' act)	149
<i>c. 123.</i> (Unlawful oaths)	157
42 <i>G. 3. c. 89.</i> (Coal measure)	205

STOPPING IN TRANSITU.

See CONSIGNOR AND CONSIGNEE.

1. A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission: held that the correspondent abroad is so far a *vendor* as between him and the trader here, that on the bankruptcy of the latter he may stop the goods in transitu by procuring the bill of lading from the bankrupt's brother; and this, though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances proveable under his commission amounting at most to part payment for the goods, which does not take away the vendor's right to stop in transitu. *Feife and another, Assignees of Brown a Bankrupt, v. Wray, M. 43 G. 3.* Page 93
2. A trader in *England* charters a ship on certain conditions for a voyage to *Russia*, and to bring goods home from his correspondent there, who accordingly ships the goods on account and at the risk of the freighter, and sends him the invoices and bills of lading of the cargo: held that the delivery of the goods on board such chartered ship does not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a *general* ship for the same purpose. And a demand of the goods having been made by the agent of the consignor, upon the captain, before they were unloaded; after which he delivered them to the assignees

signees of the vendee: held that the consignor might maintain trover against the assignees. *Bobblingk and others v. Inglis and others, Assignees of Crane, a Bankrupt, H. 43 G. 3. Page 381*

SUNDAY.

The service of process on a Sunday is absolutely void by the stat. 29 Car. 2. c. 7. s. 6. and cannot be made good by any subsequent waiver of the defendant, as by his not objecting till after a rule to plead given *Taylor v. Phillips, M. 43 G. 3. 155*

SUPLUSAGE.

A lease for a year being made between A. and B., the release, stating B. to be a trustee for C., granted the premises unto C. in his possession being, by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, *habendum* to B. and his heirs, to such uses as C. should appoint: held the release sufficient to convey the premises to B.: and the words in the granting part "unto C. &c. may be rejected as surplusage. *Spyve v. Topham, M. 43 G. 3. 115*

TENANT.

See LANDLORD AND TENANT.

TITHE.

See PROHIBITION, No. 2.

TITLE.

See COVENANT, No. 2.

ESTOPPEL, No. 1.

TIME—COMPUTATION OF.

Where time is to be computed from an act done, the day on which such act is done is to be included in the computation. Therefore, where the stat. 21 Jac. 1. c. 19. s. 2. enacts that a trader lying in prison two months (*i. e.* lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the

arrest. *Glasfington and others, Assignees of Dickey, a Bankrupt, v. Rawlins, H. 43 G. 3. Page 407*

TIME—LENGTH OF

See WAY, No. 1.

TRESPASS.

See ESTOPPEL, No. 1.

PROCESS,

Where one accidentally drove his carriage against another's, the remedy is *trespass* and not *case*; the injury being immediate from the act done; though he were no otherwise blameable than by driving on the wrong side of the road in a dark night. The distinction is, that where the injury is immediate from an act of force by the defendant the remedy is in *trespass*; where the injury is only consequential to an act before done by the defendant, there an action on the case lies. *Leame v. Bray E. 43 G. 3. 593*

TROVER.

See CONSIGNOR AND CONSIGNEE.

TRUST FOR FEME COVERT.

VENDOR AND VENDEE.

See SETTLEMENT BY ESTATE, No. 1.

STOPPING IN TRANSITU.

VENUE.

Where the cause of action substantially arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, where all the witnesses reside, at a great distance from the county where the venue is laid; the Court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact which in point of form exists in the original county. *Holmes v. Wainwright, one, &c. H. 43 G. 3. 329*

WAY.

WAY.

Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above 20 years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 26 years as all former ways were at that time extinguished by the operation of an inclosure act. *Campbell v. Wilson*, H 43 G. 3.

Page 294

WITNESS.

1. Persons appointed by statute to be governors and directors of the poor of a certain parish, and made liable upon appeal against a rate made by them to the payment of costs in case the Sessions should award any to the appellant, cannot be witnesses on such appeal; though in truth only trustees, and entitled to be reimbursed such costs out of the parochial fund; for they are parties to the cause, and liable to the costs in the first instance. *Rex v. The Governor and Directors of the Poor of St. Mary Magdalen Bermondsey, in the County of Surrey*, M. 43 G. 3.

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2. Yet a tenant who was rated to the poor rate being indemnified by his landlord, was holden a competent witness on behalf of the parish in which he was a payer, on a question of settlement. *Rex v. Woodland*, M. 26 G. 3. Page 11 n.
3. A defendant in a cause, attending an arbitrator to be examined as a witness under a rule of court, is privileged from arrest, *cundo*, *morando*, *et redeundo*. *Spence v. Stuart*, Bart. M. 43 G. 3. 89
4. It is no ground for the court to grant a new trial that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards v. Evans*, E. 43 G. 3. 451
5. Whether it be an objection to the competency of a witness for the plaintiff in an action of bribery at an election for members to serve in parliament, that a similar action was pending against the witness himself for bribery at the same election, and any acknowledgment by him that if the defendant were convicted he should avail himself, if necessary, of his having been the first discoverer to the present plaintiff. *Quare?* ib.

END OF THE THIRD VOLUME.

